

Keeping it in the Family: Minor Guardianship as Private Child Protection

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Due to the opioid use epidemic and an overwhelmed public child protection system, minor guardianship is an increasingly important tool for relative caregivers seeking to obtain legal authority regarding the children who come into their care because of a parent's crisis. Yet minor guardianship originated in colonial law for an entirely different purpose: to protect legal orphans who had inherited property. Today's guardianship laws are still based on this "orphan model" which does not fit today's reality. This Article is the first to analyze how these outdated guardianship laws are being used as a form of "private child protection" and to propose changes aimed serve the needs and interests of families in crisis.

Despite its central role in helping families address the care of children today, the use of minor guardianship for child protection has received remarkably little scholarly examination. This Article aims to fill that gap in three ways. First, it traces the transformation of minor guardianship from a probate tool used to protect orphans' property interests to its contemporary use as a way to keep children out of foster care and instead address their care within the family. Second, the Article analyzes the implications for children, parents, and relative caregivers of guardianship's use for private child protection. While families avoid the loss of control and other common problems that accompany involvement in the public child welfare system, family members cannot take advantage of the services and supports that the system can provide. Third, I outline the specific measures that states can and should enact to unlink minor guardianship laws from the "orphan model" and rework them to serve the interests of families in crisis and to reflect the broader policy goals of child protection, including preserving kinship ties.

ARTICLE CONTENTS

I. INTRODUCTION	271
II. THE ORIGINS AND DEVELOPMENT OF A PROBATE TOOL FOR CHILD PROTECTION	277
<i>A. Guardianship's Colonial Origins and Early Uses: Protecting the Property of Legal Orphans.....</i>	278
<i>B. Minor Guardianship Laws Today and the Persistence of the Orphan Model</i>	282
<i>C. Going Private: A New Purpose for Minor Guardianship.....</i>	290
1. <i>The Expanded Role for the Government in the Lives of Children and Families</i>	292
2. <i>The Increasing Importance of Defined Legal Roles, Rights, and Authority Regarding Children.....</i>	296
3. <i>How These Developments Contributed to Use of Minor Guardianship as Private Child Protection.....</i>	300
III. THE CONTEMPORARY IMPLICATIONS OF MINOR GUARDIANSHIP AS PRIVATE CHILD PROTECTION	310
<i>A. Child Protection Outside of the Public System: The Trade-Off for Families.....</i>	310
1. <i>What is Avoided: The Benefits of Staying Out of the Public Child Welfare System</i>	311
2. <i>How Parents, Children, and Families May Miss Out by Avoiding the System.....</i>	314
3. <i>Policy Implications of Ideologically and Culturally Shaped Perceptions of Families' Relation to the Child Welfare System.....</i>	320
<i>B. Child Protection in Probate Codes and Courts: The Mismatch Between Traditional Purposes and Contemporary Uses</i>	325
1. <i>A Policy Goals Framework to Evaluate Minor Guardianship for Child Protection</i>	326
2. <i>Using Probate Codes for Child Protection</i>	328
3. <i>Using Probate Courts for Child Protection</i>	341
IV. REFORMING MINOR GUARDIANSHIP TO BETTER SERVE CHILDREN AND FAMILIES IN CRISIS	343
V. CONCLUSION	354



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I. INTRODUCTION

Today's opioid use epidemic is the foremost challenge to child welfare institutions in a generation, and it is poised to be the largest in U.S. history. Thousands of parents are struggling with substance use, a problem that is exceptionally difficult to address and for which inadequate resources are available.¹ To an observer with little understanding of substance use disorders, a parent may appear to prioritize getting a fix over caring for their child, and some parents have been demonized in the media for incidents such as accidentally overdosing in the presence of their children.² A parent's opioid use can lead to repeated or extended involvement in the criminal justice system, to homelessness and acute poverty, to disappearance, and

[†] Professor of Law and Director of the Cumberland Legal Aid Clinic, University of Maine School of Law. Many people contributed to this Article's development. I received excellent research assistance from Garbrecht Law Library Reference Librarian Maureen Quinlan. I owe many thanks to Barbara Herrnstein Smith and Jennifer Wiggins for reviewing earlier drafts of this Article and for providing valuable comments and feedback. The collective wisdom I received from others directly shaped the analysis and proposals in this Article. This includes comments and suggestions of those who attended presentations of the research in this Article, including University of Maine School of Law Faculty Workshop and the 2018 Annual Meeting of the Law and Society Association in Toronto, Ontario. I appreciated the opportunity to work with Professors David English and Nina Kohn and the other members of the Uniform Law Commission Drafting Committee for the Uniform Guardianship, Conservatorship, and Other Protective Proceedings Act, which whom I discussed many of the ideas and recommendations herein. The Maine Family Law Advisory Commission and the many judges, litigants, practitioners, and guardians *ad litem* who participated in FLAC's review of and proposed revisions to Maine's minor guardianship laws were of enormous assistance in helping me understand the complexity of guardianship matters arising for families in crisis today and the specific ways that these laws need to better serve those families. Finally, this Article arose directly from the minor guardianship matters I had the privilege of supervising in the Cumberland Legal Aid Clinic, and I owe a debt of gratitude to the Clinic faculty and student attorneys with whom I've worked, and, most significantly, to the clients who granted us the privilege of assisting them during difficult chapters in their lives.

¹ Margaret Talbot, *The Addicts Next Door*, THE NEW YORKER (June 5, 2017), <https://www.newyorker.com/magazine/2017/06/05/the-addicts-next-door>; Evan Allen, *Opioids' hold on parents takes toll on kids*, BOSTON GLOBE (Dec. 1, 2016) <https://www.bostonglobe.com/metro/2016/12/01/vermont-mother-and-father-face-charges-after-taking-heroin-passing-out-with-toddlers-their-car/L7loiA8T6gXfc046lhJoeJ/story.html>; Brittany Greeson, *Children of the Opioid Epidemic Are Flooding Foster Homes. America Is Turning a Blind Eye*, MOTHER JONES (July/Aug 2017), <https://www.motherjones.com/politics/2017/07/children-ohio-opioid-epidemic/>; Sherry Lachman, *The Opioid Plague's Youngest Victims: Children in Foster Care*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/opinion/opioid-crisis-children-foster-care.html>; Maria Villeneuve, *More Maine children are being taken away because of parents' drug use*, ASSOC. PRESS (Feb. 17, 2017), <https://www.pressherald.com/2017/02/17/parents-drug-abuse-blamed-as-more-maine-children-removed-from-homes/>.

² Evan Allen, *They Passed Out From Heroin With Kids in the Car. But There Was More*, BOSTON GLOBE (Dec. 18, 2017), <https://www.bostonglobe.com/metro/2016/12/17/heroin-worst-thing-world/56dS0LH9sfPyqmcgdyK34I/story.html>.

even to death. It can also have an immediate impact on the health of children, particularly those born drug-affected.³ In terms of their volume and complexity, child welfare cases involving substance use place enormous pressure on the agencies and courts that address children's issues, mostly due to their volume and complexity.

Another institution directly affected by parents' opioid use is the family. The children of these parents, as chronicled in several media reports in recent years, are increasingly being raised and cared for by non-parent relatives.⁴ Relatives stepping into the caregiving breach is, of course, nothing new. As has been true in the past across generations and cultures, many children in the U.S. are raised by one or more non-parent relatives⁵ for some period, including when a parent is facing a crisis of some kind, such as illness, incarceration, homelessness, or a substance use disorder.⁶ But the numbers are on the rise. As of 2011, more than 3 million children—or 4% of all children—living in the United States were being raised in a home headed by a non-parent relative, most commonly a grandparent,⁷ in which the child's parent did not reside.⁸ With the expansion of the opioid crisis during the past few years, we can assume that today an even larger number of children are cared for primarily by non-parent relatives.

Most intrafamilial caregiving arrangements are short-term, informal

³ Jennifer Egan, *Children of the Opioid Epidemic*, N.Y. TIMES MAG. (May 9, 2018), <https://www.nytimes.com/2018/05/09/magazine/children-of-the-opioid-epidemic.html>.

⁴ Alejandra Cancino, *Grandparents Take a Bigger Role in Raising Grandchildren*, ASSOC. PRESS (Feb. 17, 2016), <https://www.pressherald.com/2016/02/17/grandparents-take-a-bigger-parental-role-in-raising-grandchildren/>; Katharine Q. Seelye, *Children of Heroin Crisis Find Refuge in Grandparents' Arms*, N.Y. TIMES (May 21, 2016), <https://www.nytimes.com/interactive/2016/05/05/us/grandparents-heroin-impact-kids.html>.

⁵ This may include, as is the case in many families, what is referred to by anthropologists and sociologists as “fictive kin.” These are adults who have a close relationship with a child's family but does not have a direct family connection, such as through blood, marriage, or adoption. Margaret K. Nelson, *Fictive Kin, Families We Choose, and Voluntary Kin: What Does the Discourse Tell Us?* 5 J. FAM. THEORY & REV. 259, 259 (2013).

⁶ James P. Gleeson et al., *Becoming Involved in Raising a Relative's Child: Reasons, Caregiver Motivations and Pathways to Informal Kinship Care*, 14 CHILD & FAM. SOC. WORK 300, 304–06. (2009); Erin Duques, *Note: Support for Relative Caregivers: A Look at the Financial Disincentives to Pursuing Guardianship Through the Probate Courts*, 19 QUINNIPIAC PROBATE L.J. 87, 89 (2005) (citing ADMIN. ON AGING, U.S. DEP'T OF JUSTICE, GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN (2003)).

⁷ Catherine Chase Goodman et al., *Grandmothers and Kinship Caregivers: Private Arrangements Compared to Public Welfare Oversight*, 26 CHILD. & YOUTH SERVS. REV. 287, 288 (2004). Research findings indicate that more children are being raised by grandparents today than at any time in recent history. Jill Duerr Berrick & Julia Hernandez, *Developing Consistent and Transparent Kinship Care Policy and Practice: State Mandated, Mediated, and Independent Care*, 68 CHILD. & YOUTH SERVS. REV. 24, 24 (2016).

⁸ PEW RESEARCH CTR., “AT GRANDMOTHER'S HOUSE WE STAY”: ONE-IN-TEN CHILDREN ARE LIVING WITH A GRANDPARENT (Sept. 3, 2013), https://www.pewresearch.org/wp-content/uploads/sites/3/2013/09/grandparents_report_final_2013.pdf. A total of 7.7 million children lived in homes with non-parent relatives but the majority of these homes the parents were also present. *Id.* at 1 (interpreting U.S. Census data). The practice is more prevalent in families of color—1 in 5 African-American children live with a relative during a period of their childhood, a trend that reflects “longstanding cultural responses to hardships.” Berrick & Hernandez, *supra* note 7, at 24.

arrangements and do not involve or require the legal system.⁹ Many, however, do. A relative may be legally designated a “kinship placement” if a public child welfare agency becomes involved. With or without formal agency intervention, relatives who assume a caregiving role can seek court appointment as the child’s legal “guardian.” Most relative caregivers do not seek guardianship of the children in their care. This Article focuses on those that do, and it examines the implications of that status as a form of child protection.

Minor guardianship is a legal mechanism to appoint a non-parent relative as a child’s substitute parent,¹⁰ commonly under state probate laws. Such appointment ensures that the relative caregiver has legal authority to perform actions generally reserved for parents, such as enrolling a child in school or accessing health care for the child.¹¹ When used to appoint a guardian for a child whose parent is unable to provide care but has intact parental rights,¹² minor guardianship effectively serves as a form of what I refer to as “*private child protection*.” Specifically, it involves “*child protection*” when the petitioner initiates court proceedings based on allegations of a parent’s limited ability to provide care for a child or of a risk of harm to the child. Minor guardianship is “*private*” because a state or local child welfare agency—although it may have some limited role—does not take custody of a child or otherwise initiate a public child protection proceeding. Where a public child welfare agency does pursue court intervention regarding a child, the case is commonly referred to as a “dependency” proceeding.

Guardianship is a powerful mechanism that families can use in various ways to various ends. It has both significant advantages and significant disadvantages for families in crisis that use it. On the one hand, it can stave off public agency involvement in the family, including the placement of the child in foster care. It can also prevent a parent from reassuming custody of the child on demand alone, as can occur under informal arrangements. By the same token, however, the proceedings implicate questions of both child welfare and parental rights. The guardianship effectively suspends a parent’s rights and, where a court’s appointment of a guardian is done over a parent’s objection, it infringes on the parent’s fundamental liberty interest in

⁹ Goodman et al., *supra* note 7, at 288; James P. Gleeson & Claire M. Seryak, “*I Made Some Mistakes...But I Love them Dearly*”: *The Views of Parents of Children in Informal Kinship Care*, 15 CHILD & FAM. SOC. WORK 87, 87 (2009).

¹⁰ Guardianship laws do not generally require that a petitioner be related to the child, but that has long been the regular practice. *See infra* notes 73, 85, and 90 and accompanying text.

¹¹ ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES, *Rights and Duties of the Guardian*, § 11:3 (2017).

¹² Throughout this Article I use the term “parent” to include any person who is or could be adjudicated as a child’s parent under a state’s law. In most states, such role is not necessarily determined by a genetic connection but can also include presumed, acknowledged, de facto, adoptive, and other forms of parentage. *See* Courtney G. Joslin, *Nurturing Parenthood through the UPA* (2017), 127 YALE L.J. FORUM 589 (2018).

parenting their children.¹³ Also, because guardianship is understood to be “private” and therefore outside of the public child welfare system, once a guardianship appointment is made, and even if the agency is aware of concerns about possible neglect, a public child welfare agency will provide little, if any, assistance to the family. This means the parent and child do not have access to formally supervised paths to reunification or to the critical public services and supports such families often need to help them reach it.

Two distinct legal mechanisms, “public” dependency and “private” guardianship—now typically used in quite similar contexts and based on quite similar concerns—can lead to vastly different results for the family in both the short and long term. The disparities reflect the wholly different historical origins of minor guardianship from laws governing dependency proceedings. Guardianship of children closely resembles adult guardianships: a legal mechanism, based in probate laws and courts, to appoint a fiduciary to oversee the property and person of an individual regarded as incapacitated by disability. The concept of guardianship has its origins in colonial law, created at a time when the children for whom courts appointed guardians were predominantly legal orphans, “incapacitated” by their youth, who had inherited property.¹⁴

Today, guardianships are rarely needed to ensure appropriate management of a child’s property. Instead, they are most commonly employed to address a child’s need for care of their “person” when a living parent is in a crisis that limits their ability—at least temporarily—to provide such care.¹⁵ While there are benefits to addressing the crisis within the family structure with minimal interference or involvement from the state, minor guardianship laws fail to equip courts with the authority and guidance necessary to effectively address the interests of children, their parents, and their relative caregivers under the sorts of conditions that actually prevail today.

The use of minor guardianship for child protection has received little scholarly examination.¹⁶ There is no recent empirical research on families who seek guardianship¹⁷ and, in the legal and social science literature, only

¹³ See, e.g., *Tourison v. Pepper*, 51 A.3d 470, 473 (Del. 2012); *In re Guardianship of Jewel M.*, 2 A.3d 301 (Me. 2010); *In re SRB-M*, 201 P.3d 1115, 1119–20 (Wyo. 2009).

¹⁴ See *infra* notes 36, 62 and accompanying text.

¹⁵ CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW THE LAW UNDERMINES FAMILIES* 44–52 (2014) (describing the many “specific challenges facing American families...that make it harder for parents to provide children . . . with strong, stable, positive relationships . . .”).

¹⁶ Other scholars have noted the acute dearth of scholarly attention to minor guardianship. Legal historian Lawrence Friedman has referred to minor guardianship as being “among the least-noticed, least-discussed institutions of the working legal system.” Lawrence M. Friedman, et al., *Guardians: A Research Note*, 40 AM. J. LEGAL HIST. 146, 146 (1996). Two social work researchers observed recently: “There is no literature of which these authors are aware relating to the characteristics of children or caregivers in legal guardianship. In our review, we were unable to locate a single published or unpublished scholarly paper addressing this issue.” Berrick & Hernandez, *supra* note 7, at 29.

¹⁷ Berrick & Hernandez, *supra* note 7, at 31. See also Gleeson & Seryak, *supra* note 9, at 87–89 (noting the dearth of research findings about families using informal kinship care).

limited discussion of the mechanism as child protection.¹⁸ One reason for this research gap is that minor guardianship has an ambiguous place in the law. While the statutes are still generally located in probate codes and the cases often proceed in probate courts,¹⁹ there is little use of minor guardianship in its traditional probate context—that is, in relation to death, estates, and inheritance.²⁰ Scholars who write about “guardianship” usually address only adult guardianship.²¹ At the same time, because the cases often proceed outside of family, juvenile, or dependency courts and proceedings, they are not often regarded as a form of “family law” either.²²

This Article aims to fill the gap in the scholarly literature about the role of minor guardianship today. I base my observations, discussion, and recommendations for reform on a range of sources. These include articles, commentary, and treatises by those in law and social work fields; statutes, reports, and court opinions from amith cross jurisdictions, especially in the appointment and termination realms that shed light on the context for guardianship appointments; and media reports about relative caregivers. I supplement these sources with direct experience and specifically applied research. The law school clinical program in which I am a faculty supervisor has litigated several cases involving minor guardianship in which we represented petitioners or parents, and I regularly consult with local practitioners on other guardianship matters. I also served as a consultant to

¹⁸ See, e.g., Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as a Child Welfare Resource*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS (Gerald P. Mallon & Peg McCartt Hess eds., 2005); Tiffany Buban, *Protecting Children: Using Guardianships as an Alternative to Foster Care & Adoptions*, 19 J. AM. ACAD. MATRIM. LAW. 389 (2005); Virginia G. Weisz & Suzanne McCormick, *Abandon Probate Court for Abandoned Children: Combining Probate Guardianship of the Person and Dependency into one Stronger, Fairer Children's Court*, 12 S. CAL. REV. L. & WOMEN'S STUD. 191 (2003); Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29 (1998); Joyce McConnell, *Standby Guardianships: Sharing the Legal Responsibility for Children*, 7 MD. J. CONTEMP. LEGAL ISSUES 249 (1995/6); Ann E. Ross, *Stability in Child-Parent Relations: Modifying Guardianship Law*, 33 STAN. L. REV. 905 (1981).

¹⁹ 9 C.J.S. GUARDIAN & WARD § 20 (“The most usual method of selection of a guardian is by a court having probate jurisdiction.”).

²⁰ According to Black’s Law Dictionary, the term “probate” refers to “The judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court.” *Probate*, BLACK’S LAW DICTIONARY (10th ed. 2014). The word “probate” derives from the Latin *probate* meaning “to try, test, approve, prove.” *Probate*, WEBSTER’S THIRD INTERNATIONAL DICTIONARY (2002).

²¹ For example, a search in WestLaw’s “Journals and Law Reviews” database for articles with the word “guardianship” in the title yields a list that is nearly entirely for articles discussing adult guardianship. My experience as an observer of the ULC’s process for developing the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) bears this out. The members and observers involved were drawn almost exclusively from the elder and disability law fields. Similarly, Maine’s Probate and Trust Law Advisory Commission consists of judges and attorneys who practice almost exclusively in the probate area, with little experience addressing child custody or parental rights matters.

²² Although sometimes mentioned in conjunction with so-called “Third Party Custody” laws, guardianship statutes, as I discuss herein, have a different origin and serve a distinct function from those laws. See *infra* notes 458, 460 and accompanying text.

the Maine Family Law Advisory Commission in its recent study and revision of Maine's minor guardianship law, and my research for that project included extensive interviews with a range of stakeholders.²³

In Part II of the Article, I describe how a probate tool designed to manage the property of legal orphans came to be used as private child protection.²⁴ After discussing the origins of minor guardianship as a mechanism to protect orphans' property, I provide an overview of how most of those laws are structured today.²⁵ With a focus on the provisions governing the appointment, powers, and termination of guardians, I describe the common features of contemporary guardianship laws as reflected in the nation's uniform laws.²⁶ This is followed by an examination of two historical trends that likely led to minor guardianship being used today primarily to give legal authority to relative caregivers when a parent is in crisis.²⁷ One is the increasing role taken by governmental agencies and courts in addressing child welfare, a matter formerly left entirely to families. The second is the increasing importance of legal categories of relationship between children and their caregivers to secure certain benefits. Combined, these trends lead relative caregivers to seek guardianships in order to avoid state intervention, exercise parental authority, and secure their own custody of the child.

Part III examines in detail the implications of families using minor guardianship rather than the public child welfare system to address concerns about child welfare, thereby "keeping it in the family."²⁸ One set of implications arises from having a family crisis *not* addressed through the public child welfare system.²⁹ As I discuss briefly, there are ideological and cultural factors involved in different perceptions and assessments of the desirability of private versus public agencies for child protection. A second category of implications is that, in most jurisdictions today, families that have a minor guardian must work within the state's probate codes.³⁰ As a result, decisions involving minor guardianship continue to be tied to the "orphan model" and adult guardianship rather than to the considerations embodied in either family or juvenile codes. A set of inequities and lacunae lead to quandaries for many courts and to difficult choices or the need for costly tradeoffs for many families in crisis.

²³ Report on file with author. See generally Deirdre M. Smith, *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, 68 ME. L. REV. 45 (2016) (discussing problems associated with the adjudication of minor guardianship and adoption proceedings in Maine probate courts). I also served as an observer-participant on the Drafting Committee for the development of the UGCOPAA, which was approved by the Uniform Laws Commission in July 2017.

²⁴ See *infra* notes 32–243 and accompanying text.

²⁵ See *infra* notes 36–120 and accompanying text.

²⁶ See *infra* notes 63–120 and accompanying text.

²⁷ See *infra* notes 121–243 and accompanying text.

²⁸ See *infra* notes 244–416 and accompanying text.

²⁹ See *infra* notes 245–331 and accompanying text.

³⁰ See *infra* notes 332–416 and accompanying text.

Part IV proposes a set of reforms that would address these and related problems.³¹ My presumption here is that any form of child protection, whether public or private, should seek to preserve kinship ties, particularly the parent-child relationship, while ensuring children's safety and stability. As this Article demonstrates, public and private approaches to child protection remain on distinct tracks, with potentially vastly different implications both for kinship ties and for children's needs and welfare. Minor guardianship laws and procedures should be reformed to minimize the resulting inequities. Specifically, guardianship should be unlinked from its historical placement in the probate realm, and guardianship laws and procedures should be reworked to enable courts to address the needs of families in crisis while also recognizing the rights of parents and facilitating reunification between parents and children. As now adapted for child protection uses, minor guardianship can borrow some key elements from public child protection to fit contemporary conditions and functions. Correspondingly, the public system for child protection should address the problems that lead so many families, if they have the chance and resources to do so, to seek a kinship-focused private alternative to address their concerns for children's safety and stability.

II. THE ORIGINS AND DEVELOPMENT OF A PROBATE TOOL FOR CHILD PROTECTION

Minor guardianship, this Article's focus, refers to a legal relationship created by a court by which a non-parent is assigned some or all powers and duties of a parent for the management of a child's property and "person" (generally meaning their care and education) when a parent is unable to do so.³² This Part traces the historical development of minor guardianship from its origins in a mechanism for protecting the property of legal orphans to its present use primarily as a tool for to obtain custody and decision-making authority regarding a child whose parent has limited ability to exercise their parental rights and responsibilities due to a crisis. Guardianship of minors in the United States developed in the colonial era as a mechanism to appoint a person to manage a minor's property, usually when a minor inherited from a parent.³³ Jurisdiction for appointing and overseeing guardians for both minors and adults has traditionally been assigned to state probate courts, which were created to oversee the administration of decedents' estates and

³¹ See *infra* notes 418–463 and accompanying text.

³² See *Guardian*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Someone who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability."). Some states' laws permit parental appointment of a guardian without the necessity of a court order. The focus of this Article is on scenarios in which a relative caregiver seeks a court appointment as guardian.

³³ See *infra* notes 36–41 and accompanying text.

disposition of their property, as was then the law and practice.³⁴ The contexts in which guardianships are sought have changed substantially in recent decades; the laws and courts, however, have not.

A. Guardianship's Colonial Origins and Early Uses: Protecting the Property of Legal Orphans

While the rearing of children is primarily the function of a child's parents, other members of the child's family, including siblings, grandparents, aunts, and other close relatives often participate in providing care.³⁵ When a child's parents are unable to serve in the primary caregiving role—whether temporarily or permanently—the child's relatives have traditionally served as the first responders to assume that role, providing what is sometimes referred to as “kinship care.” Such care has been what one commentator calls “a safety net for children's needs across cultures and for centuries.”³⁶ In most instances, there is no need for a court to become involved to allow the relative to take the child into their home and provide care.³⁷

At the time of this country's founding, there was one important exception to a family's ability to address a child's needs independent of court or other government involvement: when the child owned property. In such instances, because a minor could not directly control their property due to their youth, a court had to appoint a fiduciary, a “guardian,” to provide such management. Indeed, even parents, as “natural guardians,” could not oversee their children's property without court supervision.³⁸ Minors most commonly owned property because they had inherited it from their deceased fathers, so the children most in need of an appointed guardian were also legal orphans.³⁹ (A fatherless child was considered an orphan because their

³⁴ Friedman et al., *supra* note 16, at 150; *See* 9 C.J.S. GUARDIAN & WARD, *supra* note 19, at § 20.

³⁵ Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 391–94 (2008).

³⁶ Goodman et al., *supra* note 7, at 287; Linda Pollack, *Childhood, Parents and the Family 1500-1900*, in *THE ROUTLEDGE HANDBOOK OF GLOBAL CHILD WELFARE* 9 (Pat Dolan & Nick Frost eds., 2017) (noting that access to “networks of relatives” enhances “children's feelings of inclusion, sense of security and place.”).

³⁷ James P. Gleeson, *Kinship Care for Children: International Perspectives*, in *THE ROUTLEDGE HANDBOOK OF GLOBAL CHILD WELFARE* 246 (Pat Dolan & Nick Frost eds., 2017); *see also* Murray, *supra* note 35, at 393–94.

³⁸ JOHN GABRIEL WOERNER, *A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND* 40, 55 (1897). A father was entitled to the child's services and earnings, however. Friedman et al., *supra* note 16, at 147 (noting that parents did not have automatic authority to possess or control their children's property).

³⁹ Friedman et al., *supra* note 16, at 147–57. Before reforms improved women's status and property rights, a father could, through testamentary appointment, name a male guardian to oversee a surviving child's property, even if the father was survived by the child's mother. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 19, 54–66 (1994); *See also* CATHERINE WAUGH MCCULLOUGH, *GUARDIANSHIP OF CHILDREN* (1912) (describing the ways that discriminatory guardianship laws had disadvantaged mothers and the reforms

mother had limited standing and rights.) In any case, such appointment enabled the minor to enjoy the benefit of their property despite their legal disability.⁴⁰ Minor guardianship was, in many respects, one of the first forms of court supervision of a child's interests. Because courts usually appointed a relative to serve in this role,⁴¹ the child's needs were still being addressed within the family.

Minor guardianship originated in English law. Under the first statutes in U.S. law, a "guardian" was any person who had a "right and duty" to protect (literally "guard") the person or property of another, who was referred to as the guardian's "ward."⁴² The legal term "guardian" was most commonly associated with a person appointed by a court to serve as a "substitute parent"⁴³ by exercising what has been described as "'custody and control of the person or estate, or both of an infant, whose youth, inexperience, and mental weakness disqualify him for acting for himself in the ordinary affairs of life.'"⁴⁴ The primary duties of these early guardians were largely consistent with what the Uniform Law Commission (ULC) today refers to as a "conservator": to oversee the property inherited by the minor children of a decedent.⁴⁵

The varied and shifting meanings of a number of these terms are themselves significant. The term "guardian" has several uses in the law with respect to children and can refer to different roles including that of parents as a child's "natural" guardians.⁴⁶ Most state laws at least implicitly distinguish between "custody" and "guardianship" in that a custodian provides for a child's day-to-day care, whereas a guardian also has powers to make certain decisions for the child, including medical treatment, military enlistment, and other important events.⁴⁷

in several states to provide mothers the ability to serve as the sole guardians of their children after a father's death).

⁴⁰ WOERNER, *supra* note 38, at 1–2.

⁴¹ Friedman et al., *supra* note 16, at 156–57; WOERNER, *supra* note 38, at 98.

⁴² WOERNER, *supra* note 38, at 39; *See Ward*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴³ HASSELTINE BYRD TAYLOR, LAW OF GUARDIAN AND WARD 3 (1935).

⁴⁴ *Id.* (quoting JAMES SCHOUER, DOMESTIC RELATIONS § 283 (1921)); *See also* Friedman et al., *supra* note 16, at 146.

⁴⁵ *See* UNIFORM GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT §§ 102(5), 401–32. Such appointments were referred to as "curators" at the turn of the 20th century. WOERNER, *supra* note 38, at 76; Friedman et al., *supra* note 16, at 146.

⁴⁶ BLACK'S LAW DICTIONARY 822–23 (10th ed. 2014) (describing the many different legal meanings of the term "guardian"). Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in FOSTER CHILDREN IN THE COURTS 128, 154–56 (Mark Hardin ed., 1983). Under the common law, parents are the "natural guardians" of their children. MASON, *supra* note 39, at 18; TAYLOR, *supra* note 43, at 31; WOERNER, *supra* note 38, at 53–55.

⁴⁷ Hardin, *supra* note 46, at 154–155; TAYLOR, *supra* note 43, at 165. The form of guardianship that is the focus of this Article is distinct from a more recent form of minor guardianship, sometimes referred to as a "kinship" or "permanency" guardianship, a disposition available only through dependency cases under the law in several states but is not in widespread use. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, KINSHIP GUARDIANSHIP AS A PERMANENCY OPTION (2018), <https://www.childwelfare.gov/pubPDFs/kinshipguardianship.pdf>. These guardianships resemble the traditional probate guardianship in that the appointments establish a long-term legal relationship between

Because minor guardianships commonly arose in the context of death and involved the management of a minor's "estate," such appointments were generally under the exclusive jurisdiction of probate courts, known in some states as "orphan's" courts.⁴⁸ As explained in a late 19th century treatise on guardianship, the rationale for appointment of a guardian for a minor was to ensure that the minor was able to enjoy, control, and dispose of their property, which is an "inalienable right of all human beings."⁴⁹ Since, however, a child is presumably of "unsound mind"—like "idiots," "imbeciles," and other categories of adults for whom guardians could be appointed—the minor needed the assistance of someone who could supply the necessary "quality of mind" from "without" and who was charged with acting as the child would if they had the capacity to do so.⁵⁰ Phrased in more relevant practical terms, the fact that a child could not be bound in contract (for example, for the lease or sale of property) limited the potential economic benefits of the estate to the family and to any potential buyer, thus essentially removing the property from the economic life of the community until the child reached majority.⁵¹ The treatise's near-exclusive focus on the requirements for conducting and accounting for transactions of the minor's property (described in over two hundred pages) reflects a general understanding, at least at that time, of the core function of minor guardianship appointments.⁵²

A clear distinction between a ward's "property" and "person" prevailed from the early period of American probate law through to the latter half of the 20th century. If the guardian's duties were limited to overseeing a minor ward's property, as was commonly the case, any living parent retained most of their parental rights regarding the day-to-day care and control of the child.⁵³ Many guardianship statutes provided that, even if another person

a child and their primary caregiver. But the appointments occur in the context of a child protection matter where termination of parental rights and adoption are not the best option, such as for an older child, and entitle the caregiver to subsidies made available through federal law. Hardin, *supra* note 46, at 155–57. As will be discussed herein, these guardianships can serve as models for guardianships that arise in private proceedings. See *infra* notes 213–218, 298–299, 422–427 and accompanying text.

⁴⁸ Friedman et al., *supra* note 16, at 150; C.J.S. GUARDIAN & WARD, *supra* note 19, at § 20. For example, Pennsylvania and Maryland use term "Orphans Court." 20 PA. CONS. STAT. § 711 (2018); MD. CODE ANN. EST. & TRUSTS § 2-102 (2018).

⁴⁹ WOERNER, *supra* note 38, at 1–2. See also Friedman et al., *supra* note 16, at 146 (noting that guardianship was a necessary feature of any system of private property).

⁵⁰ WOERNER, *supra* note 38, at 1–2.

⁵¹ *Id.* at 7–9.

⁵² *Id.* at 172–374; Friedman et al., *supra* note 16, at 163 (noting that "property was at the heart" of most guardianship petitions in 1900). This was also confirmed through the case law of that time, which dealt largely with property management disputes. *Id.*

⁵³ Guardianship of children with living parents became less common once laws provided widows the right to oversee their minor children's property. The history and evolution of women's ability to control their and their children's property on the death of a husband is beyond the scope of this Article, but it does bear on the development of minor guardianship law, particularly with respect to testamentary guardianships when a parent names a guardian in his will. See MASON, *supra* note 39, at 18–21, 50–54, 65–67; TAYLOR, *supra* note 43, at 25.

were appointed to oversee a minor's property, the care of the "person" of the child and their education would be left to the minor's father if he was alive and competent and, if not, to the mother so long as she was unmarried and competent.⁵⁴

Thus it was rare, until quite recently, for a U.S. court to appoint a guardian solely for care of the minor's "person" and for provision of their education.⁵⁵ While guardianship laws granted probate courts the authority to assign care and custody rights to the guardian "if [the judge] deems it for the welfare of the minor,"⁵⁶ Maine courts, for example, specified that such authority was to be used only "in exceptional cases."⁵⁷ As a social work scholar noted in 1935: "The probate court has been traditionally interested in property, not child welfare."⁵⁸

The historically limited use of minor guardianship to care for the "person" and education of the child is not surprising. It was not until the Progressive Era that, as described in section II.C, below, the practice of government—including court—intervention in a family on the basis of parental abuse, neglect, or abandonment began.⁵⁹ Early dependency proceedings took place in juvenile courts, not probate courts.⁶⁰ Children from poor families who were orphaned or determined to be neglected or

⁵⁴ WOERNER, *supra* note 38, at 18–20. *See also* THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 7.5 (2018); Richard T. Davis, Jr., Comment, *Problems of Guardianship Administration in Texas*, 47 TEX. L. REV. 1124, 1126 (1969). For example, Maine's guardianship statute was revised in 1895 to apply the same standard to both fathers and mothers; it provided that fathers and mothers jointly retained the rights to care and education if they were alive and competent and to the surviving parent if one had died. ME. P.L. 1895, ch. 43, § 1 (codified in R.S. ch. 69, § 3 (1903)). As the Maine Supreme Judicial Court noted in a 1924 opinion: "To the natural guardians the law commits the child's care and custody, even if he has a guardian appointed by the probate court. The probate guardian as such (and other than in exceptional cases) has to do only with the ward's property." *Shaw v. Small*, 125 A. 496, 498 (Me. 1924); JACOBS, *supra* at § 7:3 ("When there is no estate property, a probate court may not have any jurisdiction.").

⁵⁵ *See* MASON, *supra* note 39, at 66 (noting the development of two forms of guardianship in nineteenth century); TAYLOR, *supra* note 43, at 26, 110, 168 (noting that, from the colonial period through to the publication of that study in 1935, courts generally only appointed guardians for orphaned minors with property). WOERNER, *supra* note 38, at 89–90 (discussing circumstance under which a guardian can be appointed if father is alive, such as if parents are unfit, absent, or "absconded"); Friedman et al., *supra* note 16, at 146, 157 (noting that only a small number of guardianship petitions filed in 1900 were to gain custody of a child who had been mistreated, neglected, or abandoned by parents); Davis, Jr., *supra* note 54, at 1126.

⁵⁶ ME. R.S. Ch. 69, § 3 (1903).

⁵⁷ *Shaw*, 125 A. at 498.

⁵⁸ TAYLOR, *supra* note 43, at 170. Orphans without "estates" were traditionally cared for by others through informal arrangements within the child's family; formal appointments as legal guardians were unusual and occurred only when the petitioner had the funds to pursue such appointment. *Id.* at 157. Matters concerning "guardianship of the person" were not usually the subject of petitions unless there was a dispute between two people who wanted custody of the child, in part because of the significant expense of bringing such petitions. *Id.* at 26, 168.

⁵⁹ MASON, *supra* note 39, at 100–05; LEROY ASHBY, ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY 79–83 (1997); *see* TAYLOR, *supra* note 43, at 35 ("The acknowledgement of child welfare as a state responsibility, although relatively new, now colors the concept of natural rights of parents in their children . . .").

⁶⁰ TAYLOR, *supra* note 43, at 167–70.

abandoned could become “wards of the court,” and, as such, were often placed public or charity-based orphanages.⁶¹ In other words, during the greater part of the long period of its establishment and use, minor guardianship was used almost exclusively to address the needs of legal orphans who had inherited money or property.⁶²

B. Minor Guardianship Laws Today and the Persistence of the Orphan Model

With a few exceptions, contemporary minor guardianship statutes reflect their probate law origins and purpose and retain key features of the “orphan model” from their earliest enactments.⁶³ A comprehensive review of all the components of and variations among state guardianship laws is beyond the scope of this Article, but this section gives an overview of their defining features. The section that follows details how, in practice, these laws came to be adapted as a form of private child protection.

Minor guardianship law has always been strictly a matter of individual state statute,⁶⁴ usually located within a state’s probate code. Minor guardianship is sometimes referred to as “probate guardianship” to distinguish it from other uses of a “guardian.”⁶⁵ While guardianship laws vary from state to state,⁶⁶ most include the same basic features. This consistency reflects the development and adoption of uniform guardianship laws.

The approval and adoption of uniform minor guardianship laws began with the first Uniform Probate Code (UPC), which was approved by the ULC in 1969 and includes provisions for both adult and minor guardianships.⁶⁷ The UPC has been revised several times since then, and

⁶¹ TAYLOR, *supra* note 43, at 167; ASHBY, *supra* note 59, at 23–30; WOERNER, *supra* note 38, at 76 (referring to appointment of a “public guardians” or a local sheriff as guardian, but these seem to be rare); JACOBS, *supra* note 54, at § 7.12 (public guardians still exist under some state laws). From the colonial period through the nineteenth century, a dependent child could also be “bound” or “put out” to a master. ASHBY, *supra* note 59, at 10–11, 37–51. Any of these outcomes were possible even where the child’s mother survived the father, if the mother had insufficient financial means or was found to be “incompetent” to care for the child. MASON, *supra* note 39, at 20.

⁶² See, e.g., Friedman et al., *supra* note 16, at 147, 157 (noting that inheritance due to death of a parent was the triggering event necessitating the appointment of a guardian for a minor in 62.9% of filings in 1900 in Alameda County California). A 1969 article discussing minor guardianship in Texas outlined the two situations in which a minor would need a guardian: their parents died, and someone needed to take “custody and control” and the child had property of their own, usually inherited from a parent. Davis, Jr., *supra* note 54, at 1125. See also RICHARD V. MACKAY, *GUARDIANSHIP LAW: THE LAW OF GUARDIAN AND WARD SIMPLIFIED* 16–28 (1948).

⁶³ Ann E. Ross, *Stability in Child-Parent Relations: Modifying Guardianship Law*, 33 STAN. L. REV. 905, 909 (1981).

⁶⁴ JACOBS, *supra* note 54, at § 7:1.

⁶⁵ See *supra* notes 46–47 and accompanying text.

⁶⁶ Berrick & Hernandez, *supra* note 7, at 31.

⁶⁷ UNIF. PROBATE CODE (UNIF. LAW COMM’N 1969). The Uniform Law Commission (ULC) is also known as the National Conference of Commissioners on Uniform State Laws.

twenty states have adopted a version of the UPC.⁶⁸ In 1982, the ULC issued the guardianship provisions separately in the form of the Uniform Guardianship and Protective Proceedings Act (UGPPA), which was substantially revised in 1997.⁶⁹ The UGPAA remained consistent with the guardianship provisions in the UPC until 2017, with the ULC's approval of the Uniform Guardianship Conservatorship and Other Protective Arrangements Act (UGCOPAA).⁷⁰ Although not all states have adopted the UPC, UGPAA, or UGCOPAA, the uniform laws' provisions both reflect and influence national trends in probate-based minor guardianships.⁷¹ For this reason, my review of current laws will focus primarily on the ULC's acts.

In general, the ULC's acts retain largely parallel provisions for adult and minor guardianships, particularly with respect to the general powers and duties of the guardian.⁷² A minor guardianship proceeding begins with a petition for appointment of a guardian for a child. The laws are often phrased broadly in terms of who can bring the petition, including a parent or the minor, but it is most commonly brought by the individual seeking such appointment. Although most laws do not expressly require physical custody as a standing requirement, the petitioner is likely already providing care for

⁶⁸ David M. English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit*, 12 NATL. ACAD. ELDER L. ATT. J. 33, 34 (2016); UNIF. LAW COMM'N, OVERVIEW OF UPC, <http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code>; UNIF. LAW COMM'N, UNIFORM PROBATE CODE LEGISLATIVE FACT SHEET, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code>.

⁶⁹ English, *supra* note 68, at 34. The UGPPA has been adopted (either entirely or in "substantially similar" form to the uniform act) in approximately 19 states, mostly those adopted the UPC. UNIF. LAW COMM'N, UNIFORM PROBATE CODE ENACTMENT CHART, <http://www.uniformlaws.org/Shared/Docs/Probate%20Code/UPC%20Chart.pdf>; UNIF. LAW COMM'N, ACT SUMMARY FOR UGPAA, <http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code>.

⁷⁰ The UGCOPAA has been adopted in Maine and is under consideration in other states. UNIF. GUARDIANSHIP CONSERVATORSHIP & OTHER PROT. ARRANGEMENTS ACT (UNIF. LAW COMM'N 2017).

⁷¹ The UPC has had somewhat greater influence than the extent of official adoptions would suggest. Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 UNIV. PUGET SOUND L. REV. 599, 624 (1985) ("The breadth of its scope, the quality of its drafting, and the reputations of its framers have given the Uniform Probate Code significant influence over the development of the law in non-UPC states. It has served as the model for numerous provisions on a wide variety of topics. Courts have used it both as a respected secondary authority and as an aid to statutory construction."); English, *supra* note 68, at 34 ("[E]ven if uniform laws are not enacted by states in their entirety, states often borrow from them when revising or enacting particular provisions.").

⁷² UNIF. LAW COMM'N, ACT SUMMARY OF UPC, <http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code>. The UPC provisions addressing the duties of guardians are nearly identical. UNIF. PROBATE CODE § 5-207 (duties of guardians of minors); UNIF. PROBATE CODE § 5-314 (duties of guardians of adults). JACOBS, *supra* note 54, at §§ 7:26-7:30 (discussing state laws regarding guardian's role as conservator of ward's property). The UGCOPAA reflects a slight shift away from parallel language by addressing, for example, the rights retained by parents. *See, e.g.*, UNIF. GUARDIANSHIP CONSERVATORSHIP & OTHER PROT. ARRANGEMENTS ACT § 206 ("The court, as part of an order appointing a guardian for a minor, shall state rights retained by any parent of the minor, which may include contact or visitation with the minor, decision making regarding the minor's health care, education, or other matter, or access to a record regarding the minor.").

the child in their home.⁷³

The statutes specifying the conditions under which a petitioner may be appointed a minor's guardian are, of course, crucial. If a minor has one or more living parents,⁷⁴ the petitioner may be appointed guardian under any of three circumstances with respect to each parent: (1) the parent consents to the appointment;⁷⁵ (2) the parent's rights have been terminated or suspended by circumstances;⁷⁶ or (3) the court finds that the parent is unwilling or unable to exercise their parental rights.⁷⁷ UPC-based statutes also require a finding that the appointment of the guardian is in the minor's best interest.⁷⁸

Most guardians are appointed with a parent's consent.⁷⁹ In the absence of such consent, a petitioner must prove the parent's unfitness, which may be done, as one treatise explains, by "demonstrating a personal deficiency or incapacity that has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and that has caused, or probably will result in, detriment to a child's wellbeing."⁸⁰ Thus, a Nebraska court affirmed the appointment of grandparents as guardians where the child's mother was proven to be "unfit" with evidence of her "pattern of pattern of poor decision-making" and her minimal contact with the child

⁷³ New Mexico's Kinship Guardianship Act requires that the person seeking appointment be a "caregiver" at the time of the filings, meaning that the child is in their care. N.M. STAT. ANN. § 40-10b-5. This means that the proceeding does not permit a court to order custody of the child transferred to the guardian over the parent's objection. CORINNE WOLF CHILDREN'S LAW CENTER, NEW MEXICO CHILD WELFARE HANDBOOK: A LEGAL MANUAL ON CHILD ABUSE AND NEGLECT 30A-1 (2014).

⁷⁴ Although testamentary guardianships, which take effect upon a parent's death, are less common today, they are included in many state guardianship laws. JACOBS, *supra* note 54, at § 7:7; HARALAMBIE, *supra* note 11, at § 11:10 (2017 update). Some states have standby guardians, JACOBS, *supra* note 54, at § 7:10, and this is now in the uniform guardianship acts UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 207; UNIF. PROBATE CODE § 5-202; *see* UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 202, editor's comment (UNIF. LAW COMM'N 1997). If no advance provision is made, which is most commonly the case today unless parent has a serious illness, the death of a child's parents can serve as a basis for appointment as well. HARALAMBIE, *supra* note 11, at § 11:10.

⁷⁵ The consent requirement is usually undemanding—generally the execution of a simple form—and few states require informed consent. Under probate codes based on the UGPPA, there need not be any court determination at all, as long as the guardian is nominated by the parent in a witnessed written document, the nominee accepts the appointment, and both of the minor's parents are dead or incapacitated (or have no parental rights or have been adjudicated incompetent). HARALAMBIE, *supra* note 11, at § 11:2; UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 202 (2010). The child, if 14 or older, may file an objection to the appointment of the nominee. *Id.* § 203.

⁷⁶ UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 204(b)(ii).

⁷⁷ *Id.* § 204(b)(iii). Some states have more specific language regarding abandonment or unfitness. HARALAMBIE, *supra* note 11, at § 11:2. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-610 (2018); ME. REV. STATE ANN. tit. 18-C, § 5-204(2)(c) (2019). Some laws have broad language regarding the circumstances giving rise to an appointment. *See* NY Surr. Ct. Proc. Act § 1707(1) (2018) ("If the court determines that appointment of a permanent guardian is in the best interests of the infant or child, the court shall issue a decree appointing such guardian."); CAL. PROB. CODE § 1514(a) (2018) ("if it appears necessary or convenient"); OHIO REV. CODE ANN. § 2111.02(A) (2008) (guardian may be appointed "[i]f found necessary").

⁷⁸ UNIF. PROB. CODE § 5-206(a) (amended 2008).

⁷⁹ Smith, *supra* note 23, at 66 (review of Maine guardianship matters revealed that in 2015 approximately 75% of guardians of minors were appointed without objection by a parent).

⁸⁰ LINDA D. ELROD, CHILD CUSTODY PRAC. & PROC. § 4:6 (2018).

during the four years that the child had lived with petitioners.⁸¹

Many courts have recognized the constitutional implications of appointing a guardian over a parent's objection and, as discussed further in the next section, have imposed higher standards of proof than the plain language of a statute.⁸² The UGCOPAA and some state laws also now reflect these considerations by, for example, requiring clear and convincing evidence as the basis for a finding of parental unfitness.⁸³ Significantly, however, in no state is there a standard that specifies that the finding of unfitness must be *equivalent to* that for termination of parental rights in a public child protection proceeding.⁸⁴

Also significantly, guardianship statutes say little regarding the petitioner's qualifications for appointment as a guardian of a minor. Under the early laws, a person was deemed suitable if they had good character, sound judgment, an ability to make the property productive, and other financial capabilities.⁸⁵ Courts preferred that the person appointed have at least some prior connection to the child, such as being a close family member, preferably male, rather than a "stranger in blood."⁸⁶ However, no relative other than a parent could claim guardianship of a minor by right.⁸⁷ Rather, if there was a disputed appointment, the choice of guardian was to be based on the welfare or best interest of the child.⁸⁸ The same is true today.⁸⁹ Where there is a preference for relatives over "strangers by blood," it arises largely in judicial opinions.⁹⁰ In short, and unlike "third-party custody" statutes, discussed below, an existing caregiving or parent-like relationship with a child is not a requirement for appointment to guardianship.⁹¹

Once appointed, the guardian is granted the full powers of a parent,

⁸¹ *In re Guardianship of Elizabeth H.*, 771 N.W.2d 185 (Neb. App. 2009).

⁸² *See, e.g., In re K.R.*, 735 S.E.2d 882 (W. Va. 2012); *In re Guardianship of Chamberlain*, 118 A.3d 229 (Me. 2015).

⁸³ UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARR. ACT § 201(b)(3); JACOBS, *supra* note 54, at § 7:19. *See, e.g.,* CONN. GEN. STAT. ANN. § 45a-610 (2018); *cf. Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

⁸⁴ HARALAMBIE, *supra* note 11, at § 11:2.

⁸⁵ WOERNER, *supra* note 38, at 100. In their study of guardianship petitions in California in 1900, Friedman et al. noted that courts almost always granted the petitions, usually within a matter of a few weeks, suggesting that they were not subject to extensive vetting or scrutiny. Friedman et al., *supra* note 16, at 152, 158.

⁸⁶ WOERNER, *supra* note 38, at 98-99. Friedman et al., *supra* note 16, at 152, 155 (noting that most guardians appointed in 1900, in court files examined, were the minor's mothers; if no parent was available another family member was usually appointed, especially adult siblings or grandparents).

⁸⁷ WOERNER, *supra* note 38, at 99.

⁸⁸ *Id.* at 98. The concept of a child's "best interest," which has a central place in guardianship law, *id.* at 21, has a long history in the law. *See* MASON, *supra* note 39, at 59-64, 67.

⁸⁹ The only person given statutory priority under current ULC laws is the minor's nominee if the minor is over 14. UNIF. PROBATE CODE § 5-206(a) (amended 2009).

⁹⁰ HARALAMBIE, *supra* note 11, at § 11:7; *see e.g., Kicherer v. Kicherer*, 400 A.2d 1097 (Md. 1979).

⁹¹ *See infra* notes 166-186 and accompanying text.

usually in a broadly-worded order or “letters of guardianship.” The only limit to their authority may be the power to consent to the minor’s adoption.⁹² Traditionally, the letters operated to transfer the minor’s property to the guardian for oversight and management.⁹³ Today, they serve as evidence of the guardian’s authority to perform parent-like functions; that is, to be able to enroll the minor in school, to access health care for a child, to determine where the child will live, and, along with other actions, to obtain and manage benefits and property, if not a substantial amount. These useful powers also implicitly extend, however, to determining whether the minor has visitation or other contact with their parent. Significantly, most guardianship laws are silent on the status of a parent’s rights during the period of the guardianship. While the appointment of a guardian does not terminate parental rights permanently, the rights of a parent are subject to those of the guardian and essentially suspended.⁹⁴

To the extent that a guardian’s powers are “limited” by the court—meaning that the guardian is granted something less than full powers—any unassigned powers theoretically belong to the minor’s “natural guardian,” meaning the parent. This is reflected in the early distinction between being appointed the guardian only of the minor’s property or estate rather than of their property *and* person.⁹⁵ Early guardianship orders appointing guardians of the minor’s estate granted full powers because such complete authority was needed to control and manage a minor’s property by virtue of the minor’s legal disability to do so themselves.⁹⁶

Once guardianship statutes recognized the concept of a limited guardianship, however, they did not reserve rights to the minor’s parents, but instead allowed the minor “ward” to exercise some control over their own residence and wages, using language consistent with the approach developed for *adult* wards subject to guardianships.⁹⁷ This objective is reflected in the

⁹² UNIF. PROBATE CODE § 5-109; UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 210(a), (c) (“The court may authorize a guardian for a minor to consent to the adoption of the minor if the minor does not have a parent.”).

⁹³ JACOBS, *supra* note 54, at § 7.22 (“Letters of conservatorship are evidence of transfer of all assets of the minor to the guardian of the property. They may be filed or recorded to give record notice.”). As noted above, the UPC created a distinction between a “guardian,” which was a person who stepped in the role of legal custodian with some or all of the powers of a parent (including overseeing the child’s education and health and providing a home), and a “conservator,” which was solely responsible for overseeing the management of a minor’s property, the role that had been assigned to pre-UPC guardians. UNIF. PROBATE CODE §§ 5-401–432; *see also* UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT, §§ 401–432.

⁹⁴ HARALAMBIE, *supra* note 11, at § 11:3; *see* Guardianship of Sebastien, 118 A.3d 229, 241 (Me. 2015) (“A guardian, once appointed, has almost all decision-making responsibilities for the child, which removes from the parent even the right to determine how or where the child should be raised.”).

⁹⁵ *See supra* notes 53–54 and accompanying text.

⁹⁶ WOERNER, *supra* note 38, at 15–16. Thus, unless the guardian resigned, a guardianship would terminate only “by reason of the majority of one who was a minor, the death of a ward, the marriage of a female ward, the death of the guardian, or marriage of a female guardian.” *Id.* at 327.

⁹⁷ *See* Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 740–41 (2002) (describing how adult guardianship reformers advanced the

development of the UGPPA, which permits a court to limit the guardian's powers "in the interest of developing self-reliance" on the part of the minor or for "other good cause."⁹⁸ The 1997 UGPAA made the goal of "self-reliance" an express philosophy and "major theme" of the act, as reflected in "the emphasis on limited guardianship, both for minors and adults."⁹⁹ Similarly, the ULC comment to the limited guardianship section states:

[The] court should be specific about identifying the powers of the guardian regarding the minor's education, care, health, safety, and welfare. This section gives the court flexibility to design the guardianship in a way to *empower the minor* as much as possible to make the minor's own decisions, either at the time of appointment or at a later date.¹⁰⁰

This concern for the "empowerment" of minor wards developed due to: (1) the trend in guardianship laws to minimize restrictions on adult wards advanced by reforms combined with (2) a practice of maintaining parallel treatment of minors and adults in uniform guardianship laws. It does not really reflect, therefore, a specific policy finding that *children* should have more authority over their lives when they are under guardianship than they would under the care of a parent.¹⁰¹

This empowerment orientation may also reflect a long-standing feature of most states' minor guardianship laws in terms of the role assigned to

concept of a "limited" guardianship "that would maximize the incapacitated person's autonomy and independence"); Phillip B. Tor & Bruce D. Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 LAW & PSYCHOL. REV. 1, 25 (1994) (outlining policy reasons for preferring limited guardianships including that "a ward's incapacity may be limited to specific areas of functioning such that a plenary guardianship constitutes an unreasonable deprivation of the ward's autonomy; and preventing a ward from functioning where he or she is capable 'foster(s) (further) degeneration of existing competent behaviors and obstruct(s) the development of new ones'").

⁹⁸ See UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT §§ 5-206(b), 5-304, 5-311. In fact, as one commentator has observed, "A key reason the National Conference of Commissioners on Uniform State Laws adopted the ... [UGPPA] in 1982 to amend the Article V guardianship provisions of the Uniform Probate Code (UPC) was to include the concept of limited guardianships," in recognition of "the need for more sensitive procedures and for appointments fashioned so that the authority of the protector would intrude only to the degree necessary on the liberties and prerogatives of the protected person." Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143, 161 (1996).

⁹⁹ UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 207, ULC comment (amended 1997) ("A court, whenever possible, should only grant to the guardian those powers actually needed. The court should be specific about identifying the powers of the guardian regarding the minor's education, care, health, safety, and welfare. This section gives the court flexibility to design the guardianship in a way to *empower the minor as much as possible to make the minor's own decisions*, either at the time of appointment or at a later date.") (emphasis added).

¹⁰⁰ UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 5-206, ULC comment (amended 1997) (emphasis added); HARALAMBIE, *supra* note 11, at 11:2.

¹⁰¹ See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS 9-16* (2005) (critiquing the concept of "children's rights").

minors themselves in the proceedings, generally starting at age 14.¹⁰² They are entitled to notice of and participation in the proceedings and to seek a post-appointment order concerning the guardianship.¹⁰³ Minors may nominate a specific person or state a preference for who is appointed, usually subject to approval by the court to ensure that their best interest is served.¹⁰⁴ Some state laws permit a minor to petition for a change of guardian once the minor turns 14.¹⁰⁵ These provisions granting standing and other rights to the minor, which are not usually found in other state laws regarding the care and custody of minors, stem from guardianship's origins as a fiduciary relationship between ward and guardian.

The core duty imposed on guardians of minors under the UPC is “to become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward’s capacities, limitations, needs, opportunities, and physical and mental health.”¹⁰⁶ Identical language is found in the corresponding adult guardianship provision.¹⁰⁷ Laws addressing minor and adult guardianship also include parallel language regarding obligations to educate and provide care¹⁰⁸ and the power of the guardian to “take custody” of the ward.¹⁰⁹ Although guardians of minors are effectively “substitute parents,” guardians cannot be held liable to a third party for the acts of the minor, and they are not obligated to support the minor.¹¹⁰ The UPC includes similar language in the minor and adult provisions requiring a guardian to report “on the condition of the ward” and related matters.¹¹¹ Traditionally, courts exercised minimal supervision over

¹⁰² See WOERNER, *supra* note 38, at 91–92 (discussing rights of “infants” involved in guardianship proceedings in 1897). In the UGCOPAA, the ULC lowered age of involvement from 14 to 12 to be “consistent with modern trends in the law, the revised Act provides for greater involvement of minors in decisions involving them.” UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT, prefatory notes 3–4.

¹⁰³ UNIF. PROBATE CODE §§ 5-203, 5-204(d),(e), 5-205(a)(1), 5-210(b) (amended 2010).

¹⁰⁴ UNIF. PROBATE CODE §§ 5-204(a), 5-206(a) (amended 2010); WOERNER, *supra* note 38, at 93; HARALAMBIE, *supra* note 11, at § 11:8; Davis, Jr., *supra* note 54, at 1127. Minors may also object a person nominated by a parent to be a stand-by guardian. UNIF. PROBATE CODE § 5-203 (amended 2010).

¹⁰⁵ See, e.g., OKLA. STAT. tit. 30, § 2-104 (1988) (“When a guardian has been appointed by the court for a minor under the age of fourteen (14) years, the minor, at any time after he has attained age fourteen (14), may nominate his own guardian, subject to the approval of the court.”).

¹⁰⁶ UNIF. PROBATE CODE § 5-207(b)(1) (amended 2010).

¹⁰⁷ UNIF. PROBATE CODE § 5-314(b)(1) (amended 2010).

¹⁰⁸ UNIF. PROBATE CODE §§ 5-207(a), 5-314(a)(1) (amended 2010); see JACOBS, *supra* note 54, at § 7:24 Nevada’s unitary guardianship law, which applies to both adults and minors, states that the guardian has a duty to ensure that the ward “is properly trained and educated and that the protected person has the opportunity to learn a trade, occupation or profession.” NEV. REV. STAT. § 159.079.

¹⁰⁹ UNIF. PROBATE CODE §§ 5-208(b)(2); 5-215(a)(2) (amended 2010)

¹¹⁰ HARALAMBIE, *supra* note 11, at § 11:3; UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 207, comment (“[A guardian is] basically a substitute parent, but without the personal financial responsibility for the minor’s support.”).

¹¹¹ UNIF. PROBATE CODE § 5-207(b)(5) (amended 2010) (a guardian of a minor must “report the condition of the ward and account for money and other assets in the guardian’s possession or subject to the guardian’s control, as ordered by the court on application of any person interested in the ward’s welfare or as required by court rule.”). The adult provision imposes a more specific and detailed reporting duty, including a continuing duty to report. UNIF. PROBATE CODE § 5-317 (amended 2010) (“Within 30

a guardian's management of the ward's estate.¹¹² To the extent that a court uses its authority to require any kind of reporting, the required updates are generally undemanding. There are usually no requirements for continuing investigations by a guardian *ad litem* or visitor to check on the well-being of the minor.

The uniform guardianship laws and state laws based on them make no mention of any procedure or standards for modifying an appointment order to reflect changed circumstances. Once the appointment is made, the guardianship is considered to be indefinite and essentially permanent, meaning that it remains in place until the need is eliminated by the death, marriage, or attainment of majority by the minor.¹¹³ Because such appointments were designed for situations in which a parent (or at least the father) was dead or, if living, was incompetent, the assumption was that the child had no living parent with intact parental rights and that the need for a guardian would likely continue until the child reached majority.¹¹⁴ Under these assumptions, there was no need for laws to guide courts on how to allocate rights between guardians and parents.

Until the UGCOPAA,¹¹⁵ uniform guardianship laws did not include a specific standard for terminating a guardianship while the ward was still alive, unmarried, and a minor, and most state guardianship laws lack such provisions.¹¹⁶ Today, pre-majority petitions to terminate a guardianship are most commonly filed when a parent alleges that the circumstances giving rise to the appointment—such as the parent's crisis—are no longer

days after appointment, a guardian shall report to the court in writing on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control").

¹¹² Friedman et al., *supra* note 16, at 152 (noting that guardianships were "pretty much rubber-stamp affairs" with "loose" supervision by courts). Bonds are still required by some courts when a guardian is appointed for a minor, but generally only when the guardian must manage property of the minor. JACOBS, *supra* note 54, at § 7.21 (noting that bonds are not usually required if the child has no property).

¹¹³ Friedman et al., *supra* note 16, at 165 (noting that, in 1900, guardianships of minors remained in place until the minor reached majority). Some laws permit removal of a guardian whenever it would be in a ward's best interest. UNIF. PROBATE CODE § 5-112(b) (amended 2010) (unitary provision for both adult and minor guardianships). A successor guardian can be appointed to replace a guardian who is removed, dies, or resigns. UNIF. PROBATE CODE § 5-112(c) (amended 2010) (unitary provision); HARALAMBIE, *supra* note 11, at § 11:3., § 11:14; JACOBS, *supra* note 54, at § 7:35. Contemporary guardianship laws usually provide for "temporary" guardianships, but those are time limited, such as up to 6 months, and may or may not have a more limited scope of duties. UNIF. PROBATE CODE § 5-204(d) (amended 2010); HARALAMBIE, *supra* note 11, at § 11:5. The UPC also includes provisions for the appointment of an emergency guardian upon a showing of a risk of substantial harm to the minor. UNIF. PROBATE CODE § 5-204(e) (amended 2010).

¹¹⁴ WOERNER, *supra* note 38, at 327. As one treatise states, even now: "A typical circumstance for an appointment of a guardian is when the parents die and the grandparents seek to be appointed as guardian." JACOBS, *supra* note 54, at § 7.14 (discussing "purpose" of minor guardianships).

¹¹⁵ UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 211(a) (UNIF. LAW COMM'N 2017).

¹¹⁶ UNIF. PROBATE CODE § 5-210(a) (amended 2010) ("A guardianship of a minor terminates upon the minor's death, adoption, emancipation or attainment of majority or as ordered by the court."). The UPC also includes a provision at section 210(b) permitting "a ward or a person interested in the welfare of a ward [to] petition for any order that is in the best interest of the ward." UNIF. PROBATE CODE § 5-210(b) (amended 2010).

present.¹¹⁷ In the absence of statutory guidance regarding a parent's ability to remove the guardian and regain parental rights or the standards and presumptions that apply in such instances,¹¹⁸ courts developed a range of approaches to address pre-majority petitions to terminate. As a matter of constitutional law and the doctrine of "parental preference," most courts permit parents to seek to regain custody of their child and generally terminate the guardianship unless there is a finding of current or continued unfitness,¹¹⁹ but there is no uniformity among courts' approaches. The complex issues and considerations presented when a parent seeks to terminate a guardianship over the objection of the guardian are discussed in Part III below.¹²⁰

C. Going Private: A New Purpose for Minor Guardianship

By the turn of the 21st century, the disconnect between the original functions of minor guardianship and its contemporary primary uses had become dramatically visible. Increasingly, courts' caseloads were filled, not with matters involving the management of orphans' property, but with families struggling because a parent—owing to substance use, incarceration, illness, or poverty—could not care for their children. The struggles generally stemmed from the same conditions as those seen in state dependency proceedings.¹²¹ Parental "unfitness" or abandonment had been an express or implied statutory basis for appointing a guardian of a child since the 19th century, but the predominant *use* of such appointments had been in instances where the child's parents were dead or, due to a serious illness, were unable to provide care for the child. Since that time, the context for most guardianships has come close to being reversed. Whereas the laws originally enabled families of means to appoint an outsider to manage the wealth of orphans, they were now used to enable continued family care of children whose parents were in crisis, often as the result of poverty. This section considers the factors and trends that likely led to this radical transformation.

The simplest reason for this change of function is the substantial drop in the need for the traditional uses for guardianships. Because the average life

¹¹⁷ Although the trend is not documented in any research findings, I suspect that when a guardian consents to the parent resuming care, the parties do not bother to return to court to modify or terminate the guardianship.

¹¹⁸ Some state laws do include pre-majority termination provisions. *See, e.g.*, MICH. COMP. LAWS. ANN. §§ 700.5208, 700.5219 (2008); 18-A ME. REV. STAT. ANN. § 5-212(d) (2016).

¹¹⁹ JACOBS, *supra* note 54, at § 7:35 n.5; HARALAMBIE, *supra* note 11, at § 11:14 n.2.5. *See, e.g.*, Matter of Guardianship of Jenae K.S., 539 N.W.2d 104 (Wis. Ct. App. 1995) (terminating guardianship on petition of mother and holding that, although mother was unmarried and with limited education, there were "no compelling circumstances" to deny custody to her).

¹²⁰ *See infra* notes 381–402 and accompanying text.

¹²¹ Weisz & McCormick, *supra* note 18, at 195 (noting that "bulk" of probate court matters involving guardianship death were not to address the management of orphan's property); Smith, *supra* note 23, at 66 n.30 (probate judge noted that guardianship cases involving orphans were uncommon in his court).

expectancy in the U.S. is far longer now than it was one hundred years ago, far fewer people experience the death of one or both parents during their childhood.¹²² Also, fewer children have substantial property or money of their own while their parents are alive and, where they do, other legal mechanisms are used to manage it. The UPC separated guardianship and conservatorship, with the latter being used to manage the property of minors.¹²³ Because there are fewer restrictions on parents' ability to manage their children's property today as compared with the 19th century, there is less need for a specific appointment for that purpose, such as by the surviving parent.¹²⁴ When parents or other relatives undertake estate planning, they usually find it more advantageous to provide for their children through use of trusts, which give them more flexibility and control while avoiding the "red tape and expense" of a guardianship or conservatorship to oversee the minor's property.¹²⁵

Despite the fact that a legal guardian is rarely needed today to manage a child's property, minor guardianship remains an important legal tool. Over the course of the 20th century, the primary uses of minor guardianship were re-shaped by two other developments. One was the increasing role assumed by government—through agencies and courts—to intervene in families in crisis to address child welfare concerns. The second was the emerging significance of legally defined roles, rights, and authority for parents and other caregivers. Together, these developments created strong incentives for non-parent caregivers to seek appointment as legal guardians of children in their care and also provided an effective avenue for them to do so. Minor guardianship's predominant use shifted to private child protection, not by legislative or juridical design, but to address a very different set of needs for families in crisis.

¹²² According to vital records compiled and analyzed by the U.S. Centers for Disease Control, life expectancy for men in the year 1900 was only 46.3 years, compared with 73.3 in 2015. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES: WITH CHARTBOOK ON LONG-TERM TRENDS IN HEALTH 2016, at 116 (2017), <https://www.cdc.gov/nchs/data/hus/hus16.pdf>.

¹²³ UNIF. PROBATE CODE § 5-401(1) (amended 2010) ("The court may appoint a limited or unlimited conservator or make any other protective order provided in this [part] in relation to the estate and affairs of a minor: (1) if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money . . .").

¹²⁴ The most common context for appointment of a conservator of a minor is when the child receives a personal injury settlement of a significant amount. See Michele P. Fuller & Donna M. MacKenzie, *Considerations When Settling A Lawsuit for an Individual Lacking Legal Capacity or A Minor*, 97 MICH. B.J. 32, 34 (2018). In recognition of a parent's constitutional rights, the UGCOPAA limits the appointment of a conservator for a minor with living parents to circumstances in which the appointment is in the minor's best interest, after giving weight to the relevant recommendations of the parent. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 401(1), comment (UNIF. LAW COMM'N 2017).

¹²⁵ LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 113 (2009).

1. *The Expanded Role for the Government in the Lives of Children and Families*

At the center of child welfare systems in the United States today is a government agency, the state or county child protective services (CPS), with a broad range of crucial powers. These include the power to receive and investigate allegations of child abuse and neglect; to seek a court order for the removal of children from their parents' care; to take custody of children and place them in foster care; to develop and implement a plan of reunification; and, if such a plan is unsuccessful, to seek termination of the parents' rights and the implementation of a plan for permanent placement of the children, commonly through adoption.¹²⁶

The possibility of such drastic state intervention in the name of child welfare developed during the 20th century, particularly during the second half. Until well into the 19th century, children were viewed as chattel of their families, and there was little role for institutions outside of the family to address a child's needs.¹²⁷ Since multiple generations of a family often lived in the same household or in close proximity, it was not unusual for non-parent relatives to share in the regular care of children.¹²⁸ If a child's parent was unable to serve as the primary caregiver, family members would assume that role on an informal basis for as short or long a period of time as necessary.¹²⁹

Although U.S. common law adopted the English law concept of a *parens patriae* role for the government, it was rarely invoked until the 20th century.¹³⁰ Prior to then and throughout most of the 19th century, the children whose care became a public concern were the orphans of "paupers" who were not taken in by other family members, and decisions about their care were based on serving the needs of the community, not the children.¹³¹ If another family member could not assume care, the child would likely be sent to an orphanage or almshouse when young, and then, generally after age 9 or so, indentured to a family to learn a trade and work off the costs of their

¹²⁶ MASON, *supra* note 39, at 86–87, 150–60; JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 5–6, 67–69 (1998). Although CPS agencies are sometimes based in county or municipal authorities, I will refer to the government entity overseeing public child welfare agencies generally as the "state."

¹²⁷ Brenda G. McGowan, *Historical Evolution of Child Welfare Systems*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 11–12 (Gerald P. Mallon and Peg McCartt Hess eds., 2005). See also Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and The Child as Property*, 33 WM. & MARY L. REV. 995, 1037–39 (1992); HUNTINGTON, *supra* note 15, at 120.

¹²⁸ See *supra* notes 36–37 and accompanying text.

¹²⁹ McGowan, *supra* note 127, at 12; Sacha M. Coupet, *Ain't I A Parent? The Exclusion of Kinship Caregivers From the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 602–607 (2010).

¹³⁰ MASON, *supra* note 39, at 58, 101, 150.

¹³¹ McGowan, *supra* note 127, at 12.

rearing.¹³² Institutions were operated by private charities, not the state, and there was no outside monitoring or licensing to ensure that minimum standards of care were provided.¹³³ In the U.S., children who were abused or neglected, whether in the care of their own families or an institution, were simply not the object of public concern.

Pressure for public intervention for the protection of children began to develop in the U.S. during the Progressive Era. Children's advocates urged public authorities to take responsibility for the welfare of children living in poverty rather than leave their fate to charities or their own struggling families.¹³⁴ Pursuant to their *parens patriae* authority, states established what were called "juvenile" and "dependency" courts, marking a significant change in the role of courts and public agencies in the lives of children and families.¹³⁵ Where children were found to be in need of "proper care and supervision," juvenile courts could appoint government agencies as their custodians.¹³⁶ Child welfare thus became a responsibility of the state rather than one to be addressed solely by the family or by another private actor.¹³⁷

Today's public child welfare system developed from these early-20th-century efforts. As citizens increasingly accepted the role of the government in family life, and specifically in the lives of children, child welfare policy throughout the 20th century reflected an ongoing quandary regarding the appropriate role for the state. What was the best way to understand child welfare? Should a child be "rescued" from a home experiencing possible parental inadequacy, with the resulting loss of family ties and possible long-term psychological harm to the child? Or should the primary goal of public efforts be to keep children in their homes, with the resulting risk of continued parental neglect and family dependency on public assistance? In short, in seeking to "protect children," should agencies be "homebreakers" or "homebuilders"?¹³⁸

Although prevention of abuse, family preservation, and family reunification remain stated goals of child welfare policy, in practice, the child welfare system that emerged focused on the first of these, commonly at the expense of the other two goals.¹³⁹ As one critical commentator, Clare Huntington, has noted: "The central problem of the child-welfare system is

¹³² *Id.*

¹³³ Linda Gordon, *Child Welfare: A Brief History*, SOCIAL WELFARE HISTORY PROJECT (2011), <http://socialwelfare.library.vcu.edu/programs/child-welfare-overview>.

¹³⁴ Woodhouse, *supra* note 127, at 1040–41.

¹³⁵ Hardin, *supra* note 46, at 158; McGowan, *supra* note 127, at 16.

¹³⁶ Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as Child Welfare Resource*, in *CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICE, POLICIES, AND PROGRAMS* 406 (Gerald Mallon & Peg McCartt Hess eds., 2005). These appointments were sometimes referred to as "public guardianships."

¹³⁷ See Woodhouse, *supra* note 127, at 1051 ("Progressive reforms, such as children's welfare bureaus [and] juvenile courts . . . pushed at the borders of the domestic realm.")

¹³⁸ McGowan, *supra* note 127, at 24, 36–38; WALDFOGEL, *supra* note 126, at 71.

¹³⁹ McGowan, *supra* note 127, at 25–26.

that it suffers from a fundamental disorientation. Rather than trying to prevent abuse or neglect long before it occurs, the prevailing approach to family well-being is to wait for a crisis and then intervene in a heavy-handed manner.”¹⁴⁰

While the primary work of family intervention has been left to local agencies, the federal government has had a central role in shaping the goals and institutions of such intervention across the country.¹⁴¹ With the enactment of the Child Abuse Prevention and Treatment Act of 1974 and the flow of federal funding and regulations that accompanied it,¹⁴² the public child welfare system expanded and became nationalized.¹⁴³ The laws regarding child welfare enacted by Congress in the decades that followed reflected a growing societal concern about child abuse and an increasing expectation that the government would remove children found to be in unsafe homes.¹⁴⁴ CPS agencies’ caseloads exploded under these intervention policies. By the late 1980s and 1990s, an overwhelming number of children languished in long-term foster care after unsuccessful attempts at both reunification with their parents and adoption by another family.¹⁴⁵ The high incidence of illness and death from AIDS and crack cocaine use in urban areas during those years, as well as increased incarceration and homelessness among women, had a direct and substantial impact on the number and type of CPS caseloads.¹⁴⁶

Kinship care, rather than placement in non-relative foster homes, has slowly found a place in public child welfare practices during the past few decades. Supported in part by social science findings about the benefits of kinship care¹⁴⁷ but mostly reflecting an overburdened system and a shortage of foster families, policymakers began to see the value of placing children

¹⁴⁰ HUNTINGTON, *supra* note 15, at 91.

¹⁴¹ Congress established the U.S. Children’s Bureau in 1912, which provided a central role for the federal government in overseeing and shaping the development of the child welfare system. McGowan, *supra* note 127, at 19–20.

¹⁴² Child Abuse Prevention and Treatment Act, Pub. L. 93247, 88 Stat. 4 (1974).

¹⁴³ Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1735–36 (2000).

¹⁴⁴ McGowan, *supra* note 127, at 36–37.

¹⁴⁵ Federal efforts to support adoption increased substantially with the enactment of the Adoption and Safe Families Act in 1997, which set timelines for achieving permanence, thereby encouraging cessation of reunification efforts in favor of termination of parental rights, even if adopting families were not available. Controversies and concerns over transracial adoption practices were blamed for insufficient number of kids being adopted. Testa & Miller, *supra* note 136, at 410. The availability of federal funds for adoption subsidies was an added incentive to adopt children, and the notion of “unadoptable” children was outdated. *Id.* at 412.

¹⁴⁶ Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL’Y 1, 26 (2015); Mark Testa, *New Permanency Strategies for Children in Foster Care*, in CHILD WELFARE RESEARCH: ADVANCES FOR PRACTICE AND POLICY, 108, 114 (2008); KASIA O’NEILL MURRAY & SARAH GESIRIECH, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM, PEW COMMISSION ON CHILDREN IN FOSTER CARE 4 (2004).

¹⁴⁷ See Jed Metzger, *Resiliency in Children in Kinship Care*, 87 CHILD WELFARE 115, 116–19 (2008); CHILD WELFARE LEAGUE OF AMERICA, KINSHIP CARE: A NATURAL BRIDGE, 1–2 (1984); Gleeson, *supra* note 37, at 247–52.

with relatives when they could not remain in their parents' care.¹⁴⁸ Congress enacted a series of provisions¹⁴⁹ to encourage CPS agencies to look to "kinship placement"—children in state custody residing with extended family—as an alternative to traditional foster care.¹⁵⁰ With these practices, the use of non-parent relatives as foster placements gave the family a role in the public system. Relative caregivers became licensed foster care homes, received public subsidies, and were accountable to child welfare case workers, but they could also sometimes be in adversarial positions with other family members, especially if they sought to adopt the child.¹⁵¹

The extended family has also become more involved in care of children as CPS agencies in some jurisdictions, in addition to removing children from the home through court orders, engage in interventions without court supervision. When CPS workers find a basis for concern about abuse or neglect, they may decide to ask the family to enter into an arrangement, such as a Voluntary Placement Agreement (VPA), under which a relative takes the child into their home but is provided neither a formal legal status nor foster care subsidies.¹⁵² Although ostensibly "voluntary," the implicit or explicit understanding underlying these agreements is that the family must abide by the terms to prevent further intervention by the CPS agency.¹⁵³ Parents and relatives are motivated to agree largely to ensure that the child can have a relative to live with immediately without being subject to the risks and delays of the foster care licensing process or losing control altogether if the child is taken into state custody.¹⁵⁴ In some cases, there is no formal agreement, only a relative's promise to a CPS agency worker to

¹⁴⁸ Parents' attorneys recognized that "alternative placement opportunities" such as kinship care were often the "most viable solution" to avoiding long-term foster care. Gary Wienerman, *Improving Practice to Avoid Unnecessary Placements*, in *FOSTER CHILDREN IN THE COURTS* 4, 8 (Mark Hardin ed., 1983) (explaining that parents' attorneys should ask clients to provide a list of persons "particularly relatives" who would be willing to take the child temporarily).

¹⁴⁹ In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress enacted a "kinship preference" to the list of required features for state plans. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 Pub. L. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 671(a)(19)) ("[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards;...").

¹⁵⁰ Testa & Miller, *supra* note 136, at 410–11; Mark F. Testa, *When Children Cannot Return Home: Adoption and Guardianship*, 14 *THE FUTURE OF CHILDREN: CHILDREN, FAMILIES, AND FOSTER CARE* 115, 116 (2004).

¹⁵¹ See generally *KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE* (Rob Geen ed. 2003); *RELATIVES RAISING CHILDREN: AN OVERVIEW OF KINSHIP CARE* 9–26, 90–91 (Joseph Crumbley & Robert Little eds. 1997).

¹⁵² Berrick & Hernandez, *supra* note 7, at 27; Gleeson et al., *supra* note 6, at 308; Karin Malm & Robert Geen, *When Child Welfare Agencies Rely on Voluntary Kinship Placements*, A-61 *NEW FEDERALISM* 1, 1 (2003); Karin Malm & Robert Geen, *Voluntary Placement or Kinship Diversion?*, in *KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE* 179–199 (Rob Geen ed. 2003). Various terms are used to describe such arrangements including "informal placement, an informal adjustment, or an informal or relative agreement." Malm & Geen, *Voluntary Placement*, *supra* at 152.

¹⁵³ Malm & Geen, *Voluntary Placement*, *supra* note 152, at 196–97.

¹⁵⁴ *Id.* at 185.

care for the child.¹⁵⁵ Under any of these “voluntary” kinship care arrangements,¹⁵⁶ the agency can then close the file on the child and the family.¹⁵⁷ As I indicate below and in Part III, such “kinship diversion”¹⁵⁸ practices, in which a family is left on its own to address the problem that led to the agency’s involvement, can have substantial negative consequences for parents, children, and caregiver relatives.¹⁵⁹

2. *The Increasing Importance of Defined Legal Roles, Rights, and Authority Regarding Children*

Among other implications of public agency intervention and court involvement in matters of child welfare, as described above, are constitutional limitations on such engagements in family matters. Starting in the 1920s, a series of U.S. Supreme Court opinions conceptualized the liberty interests of parents when there is unwanted state intrusion in the family.¹⁶⁰ Through several cases that directly or indirectly concerned parent-child relationships, the Court confirmed that the Due Process Clause protects parents’ fundamental liberty interests. One of the most significant opinions in this line of cases is *Santosky v. Kramer*, a child welfare case in which the Court held in 1982 that a clear and convincing evidence standard is required to terminate a parent’s rights.¹⁶¹ Writing for the majority, Justice Harry Blackmun noted the Court’s “historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”¹⁶² He explained that this

interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital

¹⁵⁵ Malm & Geen, *When Child Welfare Agencies Rely*, *supra* note 152, at 1.

¹⁵⁶ Goodman et al., *supra* note 7, at 288.

¹⁵⁷ Malm & Geen, *When Child Welfare Agencies Rely*, *supra* note 152, at 3.

¹⁵⁸ ANNIE E. CASEY FOUNDATION (AECF), *THE KINSHIP DIVERSION DEBATE: POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES AND CHILD WELFARE AGENCIES 2* (2013) (defining kinship diversion as when a child welfare agency investigates a report of child abuse or neglected, concludes that the child cannot continue to live safely with parent, and then “helps to facilitate that child’s care by a relative instead of bringing into state custody.”).

¹⁵⁹ Berrick & Hernandez, *supra* note 7, at 25–26; AECF, *supra* note 158, at 1–2.

¹⁶⁰ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding no violation of parents’ liberty interest in enforcing child labor laws regarding children of Jehovah’s Witnesses); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that compulsory public school attendance was a violation of parents’ liberty interest); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that law prohibiting teaching children foreign language was a violation of parents liberty interest).

¹⁶¹ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

¹⁶² *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972).

interest in preventing the irretrievable destruction of their family life.¹⁶³

In short, the ostensibly good intentions of a public child welfare agency acting under *parens patriae* authority are not in themselves a basis for intervention.

Alongside these constitutional developments, state laws gave more explicit definition to the roles and authority of parents and other caregivers in a child's life. Wholly private or informal arrangements regarding the care of children became less tenable for two primary reasons. First, as concerns about child custody and parental rights gained the national spotlight, agencies and agents who worked with families needed to ensure that they were taking direction from people who had the authority to provide it. For example, schools required proof of such authority to enroll children, and physicians required it to provide health and other services at the request of an adult who purported to act on behalf of and in the interests of a child in their care.¹⁶⁴ Entitlement to some government benefits and services were also often based on the legal relationship among household members.¹⁶⁵

The second reason for some caregivers to seek a legally defined role with respect to the children in their care is to obtain some measure of enforceable rights of their own, given that parents otherwise would have an unlimited authority to end the caregiving arrangement. Informal agreements between parents and caretakers can be broken. Parents can change their minds. Relationships can sour or end. If a caregiver wants security of access to the child in the face of such changes, they must have enforceable legal rights, if not as a full "parent" then in some other legally-defined role. During the latter half of the 20th century, courts and eventually state legislatures faced new questions about the legal status of non-parent caregivers or others who played a significant role in a child's life. These included grandparents, stepparents, and the unmarried partners of legal

¹⁶³ *Santosky*, 455 U.S. at 753. *See also* *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996) (“[T]he State’s authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.”).

¹⁶⁴ *See, e.g.*, 45 C.F.R. § 164.502 (2018) (HIPAA regulations that requires providers to only disclose information about minor to those who are “under applicable law a parent, guardian, or other person acting in loco parentis has authority to act on behalf of an individual who is an unemancipated minor in making decisions.”); *id.* at § 10:4.2 (“Without parental consent, a doctor, nurse or other medical professional who provides treatment risks liability.”).

¹⁶⁵ Some states limit Temporary Aid to Needy Families “family” or “child-only” grants to adults with a family-like relationship to the children if they have legal custody or guardianship of the children (or are seeking the same). Ana Beltran, *Improving Grandfamilies’ Access to Temporary Assistance for Needy Families*, 1 GRANDFAMILIES: CONTEMP. J. RES., PRAC. & POL’Y 56 (2014); Carol B. Cox, *Policy and Custodial Grandparents*, 11 MARQ. ELDER’S ADVISOR 281, 285–88 (2010); *see, e.g.*, CONN. GEN. STAT. 17b-112(a) (2019); 16 DEL. ADMIN. CODE § 5100-3004 (2018).

parents, especially in same-sex households.¹⁶⁶

Concerns about children in troubled families and the role of other family members in addressing their needs gave rise to important legal developments regarding the legal status of grandparents and other close relatives. While intrafamilial estrangement and conflict was certainly nothing new, the idea of parents and other relatives—including grandparents—being opposing litigants or interested parties in the same court proceedings involving a minor child and parental fitness was previously uncommon. The increasing possibility of such courtroom and legislative disputes raised questions about the value and role of non-parent relatives in the lives of children and also about the role of courts and public agencies in preserving or limiting those roles in light of the constitutional rights of parents.¹⁶⁷

One of the most significant developments in non-parent caregivers' legal status came during the 1970s and 1980s, when every state enacted some form of a Grandparents Visitation Act (GVA), a law that enables some grandparents to obtain court-ordered access to a grandchild over the objection of a child's parents.¹⁶⁸ A number of demographic forces led to the rapid and universal adoption of GVAs. These included a sharp increase in divorce and other reasons for single-parent households, such as the death of a parent, leading to estrangements within extended families and other barriers to grandparents' continued access to their grandchildren.¹⁶⁹ At the same time, older Americans were becoming a significant political force; they were "greater in number, healthier, and more politically conscious, and

¹⁶⁶ See generally Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43 (2008); Coupet, *supra* note 129.

¹⁶⁷ See generally Gupta-Kagan, *supra* note 166; Coupet, *supra* note 129; Kathleen Meara, *What's in a Name? Defining and Granting a Legal Status to Grandparents Who are Informal Primary Caregivers of Their Grandchildren*, 52 FAM. CT. REV. 128 (2014); Stephen A. Newman, *Grandparent Visitation Claims: Assessing The Multiple Harms of Litigation to Families and Children*, 13 B.U. PUB. INT. L.J. 21 (2003); Andre P. Derdeyn, *Grandparent Visitation Rights: Rendering Family Dissension More Pronounced?*, 44 AM. J. ORTHOPSYCHIATRY 277 (1985).

¹⁶⁸ Anne Marie Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 564, 570–74 (1994); ELROD, *supra* note 80, at § 1:2. New York enacted the first GVA in 1965, and by 1862, every state in the country had adopted a GVA, with the vast majority being enacted between 1975 and 1985. Karen J. McMullen, *The Scarlet "N": Grandparent Visitation Statutes That Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment*, 83 ST. JOHN'S L. REV. 693, 693 n.3 (2012); Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59, 60 (1991); Derdeyn, *supra* note 167, at 277.

¹⁶⁹ Jackson, *supra* note 168, at 575; Burns, *supra* note 168, at 59. These factors were also combined with decreasing birthrates (making ties to grandchildren more valuable), increasing life expectancy (meaning grandparents were around longer to develop relationships with grandkids), increased family estrangement of extended families, such as from employment-driven migration and relocation. Jackson, *supra* note 168, at 563–644 (citing *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 97TH CONG., 2D SESS. 71 (1982) and *Grandparents' Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102D CONG., 1ST SESS. 3 (1991)).

powerful than in prior decades,¹⁷⁰ as one commentator noted in 1985. Advocates for legal recognition of grandparent caregivers coined the term “Grandfamilies.”¹⁷¹

GVA laws immediately became the subject of controversy. There were concerns that such laws set up contests between parents and grandparents for the affection of the child, increasing friction and animosity within the family.¹⁷² Questions about the constitutionality of these laws were also raised from the start, through both scholarly criticism and litigation.¹⁷³ One commentator noted: “A statute or court order requiring a parent to allow a grandparent to visit with the parent’s child intrudes on the parent’s fundamental right to decide who may see the child and when and where such meeting shall take place.”¹⁷⁴

The U.S. Supreme Court eventually weighed in in 2000 with its opinion in *Troxel v. Granville* striking down Washington’s “breathhtakingly broad” GVA.¹⁷⁵ The opinion established the basic constitutional framework for examining laws and court actions permitting non-parent interference with parenting decisions, with implications for minor guardianship proceedings as well.¹⁷⁶ The trial court’s award of visitation rights to grandparents over a parent’s objection, Justice Sandra Day O’Conner wrote for the plurality, “directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. . . . In that respect, the court’s presumption [in that case] failed to provide any protection for [the parent’s] fundamental constitutional right to make decisions concerning the rearing of her own daughters.”¹⁷⁷

One of the most significant implications of *Troxel* is that, as one court noted, “the best interests of the child standard, standing alone, is an insufficient standard for determining when the state may intervene in the decision making of competent parents.”¹⁷⁸ For the first time, the Supreme Court applied the “superior rights” doctrine to limit interference by non-state parties in parenting decisions.¹⁷⁹ A court can grant a relative or other third party access to a child only if it first affords the child’s parents the

¹⁷⁰ Derdeyn, *supra* note 167, at 282. *See also* Jackson, *supra* note 168, at 564 (stating that success was due to “well-organized efforts of grandparents and their supporters”); Gupta-Kagan, *supra* note 166, at 76 (noting that state legislators found it “politically difficult to take a stand against grandparents” who proved their “significant clout” repeatedly).

¹⁷¹ Gupta-Kagan, *supra* note 166, at 46.

¹⁷² Derdeyn, *supra* note 167, at 279, 281–82. *See also* Karen Czapanskiy, *Grandparents, Parents, and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1346 (1994).

¹⁷³ *See, e.g.*, Burns, *supra* note 168, at 61; Jackson, *supra* note 168, at 577–87.

¹⁷⁴ Burns, *supra* note 168, at 63.

¹⁷⁵ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁷⁶ Gupta-Kagan, *supra* note 166, at 68. *See also* ELROD, *supra* note 80, at § 4:6.

¹⁷⁷ *Troxel*, 530 U.S. at 69–70.

¹⁷⁸ *Rideout v. Riendeau*, 761 A.2d 291, 297 (Me. 2000) (citing *Troxel*, 530 U.S. at 67). Some commentators have argued that courts have placed more significance on the *Troxel* opinion than is warranted. *See, e.g.*, Gupta-Kagan, *supra* note 166, at 67.

¹⁷⁹ Coupet, *supra* note 129, at 616.

presumption that they are acting in their children's best interests, employing what is sometimes referred to as the "parental preference" doctrine or "*Troxel* presumption."¹⁸⁰ This holding has shaped several developments in family law, including contested minor guardianship matters.¹⁸¹

GVAs provide a route only to visitation with a grandchild. When grandparents or other relatives who had served as caregivers seek custody or legal status as a parent or the equivalent, they must pursue other legal avenues, for example, by petitioning for rights as a "de facto" parent.¹⁸² Such forms of status, based on the pre-litigation role the caregiver played in a child's life, provide the full rights of a parent and convey both "practical and expressive value."¹⁸³ Achieving such status or even establishing standing to litigate the question of custody, however, requires the grandparent or other relative caregiver to overcome the significant constitutional limitations confirmed by *Troxel*.¹⁸⁴ Some courts have been reluctant to award grandparents—as opposed to the former spouses and partners of parents—status as "parents" under these theories.¹⁸⁵ As legal scholar Sacha Coupet has argued, U.S. family law is built around the implicit model of a "conjugal-horizontal" parental dyad. The possibility of a child's legal "parents" falling outside of this paradigm and crossing generations has been met with strong resistance from courts and legislatures.¹⁸⁶

3. How These Developments Contributed to Use of Minor Guardianship as Private Child Protection

If we pull the strands of these legal and social trends together, we can see how and why minor guardianship became primarily a mechanism for relatives to obtain legal custody of a child when a parent is unable to provide care. While kinship caregiving is nothing new, for many families it had become increasingly difficult to leave these arrangements as strictly informal, without involving courts at all.¹⁸⁷ Minor guardianship provides a route for a kinship caregiver to obtain a legally defined role.

¹⁸⁰ See, e.g., *In re K.H.*, 773 S.E.2d 20, 30 (W. Va. 2015); *Tourison v. Pepper*, 51 A.3d 470, 473 (Del. 2012); *In re D.I.S.*, 249 P.3d 775, 784 (Colo. 2011); *In re Guardianship of Reena D.*, 35 A.3d 509, 513 (N.H. 2011).

¹⁸¹ See, e.g., *Matter of Guardianship of W.L.*, 467 S.W.3d 129, 133 (Ark. 2015); *In re Guardianship of Chamberlain*, 118 A.3d 229, 238 (Me. 2015); *Guardianship of Richard C.*, B247332, 2014 WL 1316684, at *8 (Cal. Ct. App. Apr. 2, 2014); *In re D.I.S.*, 249 P.3d 775, 776 (Colo. 2011).

¹⁸² Meara, *supra* note 167, at 132–33; Elizabeth Barker Brandt, *De Facto Custodians: A Response to The Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 302–305 (2004) (discussing Kentucky's "de facto custodian" law).

¹⁸³ Coupet, *supra* note 129, at 611.

¹⁸⁴ Gupta-Kagan, *supra* note 166, at 73–84 (analyzing the "overwhelmingly confused" body of case law in state courts regarding the standing of non-parent caregivers seeking custody rights).

¹⁸⁵ Meara, *supra* note 167, at 132–33.

¹⁸⁶ Coupet, *supra* note 129, at 615, 636.

¹⁸⁷ RELATIVES RAISING CHILDREN, *supra* note 151, at 74 ("The overwhelming majority of kinship caregivers never see the inside of a courtroom or seek the approval of a judge. In these situations, the caregiver has physical custody only.")

Because, as noted above, information about the families who pursue guardianship is limited, little is known about the incidence, characteristics, strengths, or challenges of the children or relative caregivers involved with these cases.¹⁸⁸ As two social work scholars observed in a recent article: “The research literature on legal guardianship is remarkably sparse.”¹⁸⁹ My analysis in what follows is based on research on how minor guardianships are used in Maine and on what can be gleaned about their use nationally from the existing cases, reports, and other materials.¹⁹⁰

a. Obtaining Authority to Make Decisions Regarding Children in their Care

The initial and most apparent reason that relative caregivers seek appointment as a legal guardian is to obtain the legal authority to act as substitute parent with respect to the child's schools, doctors, and other providers. Just as there was a need for a guardian to manage property in the 19th century, there is a need today for legal authority to do what is reserved for parents in terms of decision making, accessing education and care, and receiving public benefits.¹⁹¹ When a child is placed in the care of a grandparent, parents do not always execute legal documents, such as powers of attorney, to delegate parental rights to the grandparent.¹⁹² Even if a parent has done so, legal guardianship is specifically required to take certain actions with regard to a child, for example, accessing public benefits for the child or enrolling them in school.¹⁹³ Having legal guardianship is important for a caretaker's interactions with other institutions and systems as well. For example, many prisons and jails will not permit a child to visit an incarcerated parent unless accompanied by another parent or legal

¹⁸⁸ Berrick & Hernandez, *supra* note 7, at 26; Gleeson et al., *supra* note 6, at 300–01.

¹⁸⁹ Berrick & Hernandez, *supra* note 7, at 26. *See also* AECF, *supra* note 158, at 2 (noting that little information is available about families affected by kinship diversion practices).

¹⁹⁰ This research included interviews with stakeholders involved in these cases including judges, guardians *ad litem*, attorneys, and litigants, as well as knowledge gained through supervising numerous guardianship cases the law school's clinic. Reports on file with Author. The Vermont Legislature appointed a Task Force to undertake a comparable study of the use of minor guardianship in that state. ACT 56 MINOR GUARDIANSHIP COMM., MINOR GUARDIANSHIP PROCEEDINGS IN VERMONT: 2012 REPORT TO THE VERMONT LEGISLATURE (2012), https://www.vermontjudiciary.org/sites/default/files/documents/Minor_Guardianship_Proceedings_in_VT_2012.pdf.

¹⁹¹ RELATIVES RAISING CHILDREN, *supra* note 151, at 77 (noting that some relatives must use “creative ways to maneuver around” the parental consent requirements, including waiting until medical need merits a trip to the emergency room); Cox, *supra* note 165, at 286, 296–98; Meara, *supra* note 167, at 130–31; Brandt, *supra* note 182, at 294–95. For example, a written delegation of parental rights or “power of attorney” is not usually sufficient to obtain legal authority for enrollment. Brandt, *supra* note 182, at 295, 300. One scholar has noted that, while kinship families face numerous stressors, “one of the most vexing hurdles they face is the ambiguous, often tenuous legal status.” Coupet, *supra* note 129, at 608.

¹⁹² Mary C. Rudasill, *Grandparents Raising Grandchildren: Problems and Policy from an Illinois Perspective*, 3 ELDER L.J. 215, 217–18 (1995); Coupet, *supra* note 129, at 609.

¹⁹³ Gupta-Kagan, *supra* note 166, at 46; Duques, *supra* note 6, at 91.

guardian.¹⁹⁴ Families in these situations must pursue a court action in order to meet a child's immediate needs.¹⁹⁵

Clearly, then, minor guardianship provides relative caregivers with a route to obtaining necessary legal status for providing care for children, sometimes to address an immediate need. But it also requires families to use a legal tool designed for complete, permanent assumption of parenting responsibilities for a minor. Most guardianship laws, as discussed further in Part III, are a poor fit for the actual needs of today's families.

b. Avoiding State Intervention and Foster Care

As indicated by the title of this Article, "Keeping it in the Family," a major reason for relatives to seek guardianship is to ensure that the family—and not the state—has the central role in addressing a child's needs when the parent is unable to do so.¹⁹⁶ The use of guardianships for this purpose originated in observations and proposals published by several scholars in the social work field in the mid-20th century.¹⁹⁷ As the child welfare system and foster care expanded, these scholars urged consideration of guardianships as an alternative to foster care and adoption to preserve familial ties while also ensuring care and stability for the child.¹⁹⁸ These initial suggestions were about children already formally in the child welfare system, but they shaped the re-framing of minor guardianship into a mechanism to help families in need due to parents' limited ability to provide care for children.¹⁹⁹

Guardianship did not immediately gain ground as an alternative to foster care in the wake of these arguments because national child welfare trends placed emphasis on the goals of either reunification or adoption;

¹⁹⁴ This is the policy in several Maine institutions. Our Clinic represented an incarcerated mother who consented to having her mother appointed as legal guardian of the client's infant daughter so that she could have contact with the baby during her incarceration for a drug-related conviction.

¹⁹⁵ Berrick & Hernandez, *supra* note 7, at 25; JACOBS, *supra* note 54, at § 7.14 n.12.

¹⁹⁶ Cf. Gleeson et al., *supra* note 6, at 300–01 (summarizing prior research findings that relative caregivers' motivations for providing kinship care include keeping the child out of foster care and "within the family"); *id.* at 306 (describing authors' research findings confirming the same). See also CASEY FAMILY SERVS., A STUDY OF THE STATE OF CONNECTICUT'S PROBATE COURTS AND THE MANAGEMENT OF CHILDREN'S MATTERS INVOLVING CUSTODY AND GUARDIANSHIP, FINAL REPORT 5 (2003) [hereinafter "CFS FINAL REPORT"] (describing reasons relative caregivers seek guardianship and how such actions means that a "significant number of children are not becoming wards of the state").

¹⁹⁷ Bogart R. Leashore, *Demystifying Legal Guardianship: An Unexplored Option for Dependent Children*, 23 J. FAM. L. 391, 393–97 (1984); HASSELTINE BYRD TAYLOR, *Guardianship or "Permanent Placement of Children"*, in THE LAW OF THE POOR 417 (Jacobus tenBroek ed. 1966); Alice Scott Hyatt, *Guardianship of Children*, SOCIAL SECURITY BULLETIN, Jan.–Feb. 1950, at 10; IRVING WEISSMAN, GUARDIANSHIP: A WAY OF FULFILLING PUBLIC RESPONSIBILITY FOR CHILDREN (n.d.) (publication date does not appear in book itself; other sources consistently cite it as 1949).

¹⁹⁸ Testa & Miller, *supra* note 136, at 412–13; Testa, *supra* note 150, at 120–21; CAROL W. WILLIAMS, *Expanding the Options in the Quest for Permanence*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 266, 276–82 (Joyce Everett, Bogart Leashore, & Sandra Stukes Chipungu, eds. 1992) (noting that "guardianship complements the social and cultural reality of many African American children"); Leashore, *supra* note 197, at 393–97.

¹⁹⁹ Leashore, *supra* note 197, at 393 ("Typically, probate guardianship over a child occurs if a child's parents die or become incapacitated and someone assumes legal control of the child.").

guardianship neither returned children to their parents nor provided a degree of permanency equivalent to adoption.²⁰⁰ But as children were increasingly placed with relatives after removal from their parents' care, agencies and policymakers had to consider the potential role of relatives for permanency outcomes, not merely placement. With the increasing use of kinship caregivers as foster parents, there were fewer adoptions out of foster care. In contrast to non-relative foster families, relatives providing such care were often reluctant to seek adoption when it meant that the court would, as part of that process, also terminate the parental rights of their own adult child or another close relative.²⁰¹ Some kinship caretakers felt that they already had a defined familial relationship with the child and saw little need to place a "parent" label on it through formal adoption.²⁰² With reunifications and adoptions on the decline, guardianship became a more acceptable alternative form of permanency for children in foster care.

When Bogart Leashore, an influential scholar writing in the 1980s, reimagined minor guardianship as a child welfare tool, it was because he saw the potential benefits of guardianship for children without property and otherwise in need of care.²⁰³ In his research, he had noted that significant numbers of children—particularly children of color—who had been removed from their parents' homes were not likely either to return to those homes or to be adopted into other families.²⁰⁴ He observed that familial bonds are not easily broken and that the emotional impact on children of removal from their families was often severe. Appointing a relative as a child's guardian, he argued, could preserve the child's kinship ties.²⁰⁵

Specifically, guardianship would allow the child's parents to remain in their life and perhaps even to have a role in the placement selection. Children would be in the care of their own relatives or of others who knew them and who would not "deny the existence of their parents," thus further enabling them to sustain familial ties.²⁰⁶ Such arrangements, he argued, could alleviate the "identity problems" that often accompanied adoption, as evidenced by the number of adoptees who search out their birth families later

²⁰⁰ Testa, *supra* note 150, at 116–18.

²⁰¹ *Id.* at 121; Testa & Miller, *supra* note 136, at 411.

²⁰² Testa, *supra* note 150, at 121; Brandt, *supra* note 182, at 297–98. See also Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV. 1079, 1088–89 (2013).

²⁰³ He characterized "probate guardianship" as something that was done for children without parents and who had estates from a guardianship that awarded custody, in which the guardian plays a role similar to a foster or adopting family. Leashore, *supra* note 197, at 393.

²⁰⁴ Leashore, *supra* note 197, at 391–92.

²⁰⁵ Testa & Miller, *supra* note 136, at 412.

²⁰⁶ Leashore, *supra* note 197, at 400. Leashore referenced a 1970 article which made similar points regarding the importance of children having guardianships, preferably with relatives, rather than state custody. Esther Appelberg, *The Significance of Personal Guardianship for Children in Casework*, 49 CHILD WELFARE 6 (1970).

in life.²⁰⁷ As had earlier scholars, Leashore noted that, while a state may “take custody” of a child, it can never really function as a substitute parent providing day-to-day care. Non-relative foster parents appointed by the state are limited in their role because their authority must be specifically delegated by the state, and they function more as a “hired hand” than as a member of a family.²⁰⁸ In addition, foster care often involves disruption and uncertainty, as well as the potential for abuse or neglect.²⁰⁹ Guardianship would thus provide a route to securing a legal relationship by another relative without the finality of adoption.²¹⁰

The model of guardianship that Leashore promoted differed from traditional probate guardianship in several important respects. The guardians could receive public subsidies like those provided to foster and adopting families. There would also be a continuing role for the child welfare agency in assessing the child’s well-being, setting up and supervising visits with parents, and providing ongoing services to the family to support potential reunification.²¹¹ Given what he saw as its many potential advantages, Leashore urged legal and social work professionals to stop associating guardianship with death and property and, instead, to use it for any child who needs “protection, love, care, and guidance.”²¹²

Leashore’s ideas gained traction with other scholars²¹³ and eventually with policymakers. His model is reflected in what is commonly known as “kinship” or “permanency” guardianship.²¹⁴ With the support of federal funds for demonstration projects, a number of states developed laws for guardianship as another permanency option for children in state custody who could not be returned to their parents’ care but were also, either because of the child’s age or a relative caregiver’s reluctance to pursue that option, not likely to be adopted.²¹⁵ Under this new, hybrid form of guardianship, the court overseeing the dependency proceeding can transfer custody of the child from the state to the relative caregiver.²¹⁶ These permanency

²⁰⁷ Leashore, *supra* note 197, at 394.

²⁰⁸ *Id.* at 395.

²⁰⁹ *Id.* at 396.

²¹⁰ *Id.* at 397.

²¹¹ *Id.* at 398–99.

²¹² *Id.* at 400.

²¹³ WILLIAMS, *supra* note 198, at 276–78; Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 457–73 (1996); Testa & Miller, *supra* note 136, at 412–14; Ann E. Ross, *Stability in Child-Parent Relations: Modifying Guardianship Law*, 33 STAN. L. REV. 905, 907, 909 (1981) (“Guardianship, in theory, enhances the custodial family’s integrity while maintaining the tie between biological parents and their child. Proponents of guardianship claim that it assures the child a stable family relationship when it appears unlikely that the child can return to its parents and when adoption is inappropriate.”).

²¹⁴ Testa & Miller, *supra* note 136, at 412–15; Testa, *supra* note 150, at 120–21.

²¹⁵ HUNTINGTON, *supra* note 15, at 129; Cox, *supra* note 165, at 290.

²¹⁶ Berrick & Hernandez, *supra* note 7, at 27. There are specific federal law requirements for such arrangements, including that the relative caregiver must have provided care for the child for at least six months, that other permanency options were ruled out, and that there is a strong relationship between the

guardianships—which remain distinct from traditional probate guardianship and are limited to families in the formal child welfare system—are now potentially available.²¹⁷ Unfortunately, despite their useful, innovative features, these tools remain in only limited use.²¹⁸

It was not until the final decades of the 20th century that traditional probate guardianship was significantly re-purposed as a potential private child protection tool to address the problems Leashore identified and to serve the basic goals he advanced, that is, to keep children out of foster care and to maintain familial ties.²¹⁹ With legal standards that consider both the child’s needs and parental fitness, a guardianship case can strongly resemble a dependency proceeding. It differs in that, rather than a state CPS agency seeking a change in legal custody based on allegations of parental unfitness, it is the petitioning relative who does so. What is crucially limiting here is that, by pursuing guardianship on their own, families must still use the standard guardianship law. Those statutes still rooted in the orphan model lack the innovations advanced by Leashore, reflected now only in “permanency guardianships.”

This shift to the increased use of guardianship by families was, in part, facilitated by child welfare agencies. The benefits of kinship placement and permanency demonstrated that guardianship could be a way to avoid a dependency proceeding entirely by having a relative directly assume care of a child and obtain the legal authority to do so, such placement bypassed the need for any formal state intervention. For some agencies, guardianship was an extension of kinship diversion and therefore a way to avoid a number of burdens that followed when a child when seen to be in need or removed from a parent: taking on a family in the caseload, identifying a potential foster family or, alternatively, assisting a relative caregiver with foster care licensing and payment, and providing reunification services.²²⁰ Once a legal guardianship was in place, the agency could close its file on the family.²²¹

relative caregiver and the child. *Id.* at 28. States provide guardianship households federally-backed subsidies under Guardianship Assistance Programs (GAP). Katz, *supra* note 202, at 1096–97.

²¹⁷ Most states, the District of Columbia, and some tribal jurisdictions, have enacted statutes authorizing subsidized guardianships. Berrick & Hernandez, *supra* note 7, at 28; Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 145 (2013)

²¹⁸ Godsoe, *supra* note 217, at 144–48 (noting that permanency guardianship statutes has failed to bring about a needed “paradigm shift” in child welfare policy due to “implicit bias, both on a systemic level and through individual workers”). Some policymakers and public agencies regard permanency guardianships as not sufficiently “permanent” because a parent maintains their right to seek modification or termination. This debate implicates an important distinction between “lasting” and “binding” attachments. Testa & Miller, *supra* note 136, at 415–16. Some research indicates that adoption, although more legally “binding” is just as vulnerable to “disruption” as guardianship. *Id.* at 417–18. This may be because the attachments created through adoption are not as “lasting” as those created through the family bonds that are the prerequisite to permanency guardianship.

²¹⁹ Testa & Miller, *supra* note 136, at 407–08.

²²⁰ GA. OFFICE OF THE CHILD ADVOCATE, REDUCING THE FOSTER CARE ROLLS: ARE WE USING THE RIGHT TOOLS? 3 (2009).

²²¹ *Id.* at 9; Julia Zalenski, *Minor Guardianships Created by the Probate Court When the Department for Children and Families is Involved: Problems with Possible Solutions*, 37 VT. B.J. 26, 28

One Vermont probate judge described favorably the “family engagement strategies” of his state’s child welfare agency. “[P]robate guardianships,” he noted, “have value for families who take control of their own family problems.”²²² Specifically, he explained, “There is a value for the state to provide a forum for family resolution of issues within a legal framework outside” of the formal child protection context.²²³

Petitioning for guardianship also emerged as a strategy used by families to avoid any level of involvement by a child welfare agency.²²⁴ As I discuss in Part III, even with the increased use of kinship placement, the child welfare system does not serve many families well.²²⁵ More often than not, state child welfare agencies will not place children with relatives after removal from the home.²²⁶ While families had long engaged in informal kinship care to stave off state intervention, a court appointment as a guardian provided far more security against any such interference.²²⁷ One grandmother said she got “legal custody”—presumably guardianship—of a child in her care after kinship diversion because otherwise the state could “still come in and take my [] child away.”²²⁸

Also, through a guardianship, a parent in some sort of difficulty may arrange for a third person to assume parental duties without an otherwise disturbing and damaging court finding of “unfitness.” In fact, most minor guardianships are created with the consent of the parent.²²⁹ As one commentator observed: “Guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation

(2011). Because much of this practice is “off the books” and not part of the reporting obligations by public welfare agencies (the cases were just reported as investigated and not needing further intervention) it is impossible to know how many children ended up in a relative’s care through minor guardianship at the behest of a public welfare agency, or by a family to avoid the threat of a child’s removal by the same). See NAT’L COAL. FOR CHILD PROT. REFORM, TEXAS HIDE ‘EM: NEARLY TWO-THIRDS OF STATE’S FOSTER CARE PLACEMENTS ARE “OFF THE BOOKS” (2016), <https://www.nccprblog.org/2016/04/texas-hide-em-nearly-two-thirds-of.html> (“Kinship care almost always is a better, safer option than stranger care. But it is still foster care.”).

²²² George K. Belcher, *Custodial Kinship Guardianships for Minors: A Response to Zalenski*, 38 VT. B.J. 25 (2012) (emphasis added).

²²³ *Id.* at 25.

²²⁴ Gupta-Kagan, *supra* note 166, at 62.

²²⁵ Weisz & McCormick, *supra* note 18, at 197.

²²⁶ Gupta-Kagan, *supra* note 166, at 61 (noting that research indicated that only a quarter of children in foster care lived with relatives).

²²⁷ Weisz & McCormick, *supra* note 18, at 197 (noting a shifting in the numbers of children in Los Angeles County living with relative caregivers rather than foster care); Duques, *supra* note 6, at 91.

²²⁸ AECF, *supra* note 158, at 4. Guardianship as private child protection was a trend also consistent with and embraced by the goals and positions of grandparents’ advocacy groups. See, e.g., AM. ASSOC. OF RETIRED PERS., RAISING GRANDKIDS: LEGAL ISSUES, <https://www.aarp.org/relationships/friends-family/info-08-2011/grandfamilies-guide-legal-issues.html>.

²²⁹ Berrick & Hernandez, *supra* note 7, at 26. Smith, *supra* note 23, at 87 n.272. Both of these data sets suggest that at least 75-80% of guardianship matters are uncontested. See also Belcher, *supra* note 222, at 25.

so they can resume custody of their child in the future.”²³⁰ While that may be the aim of many guardianship petitions, for many other families, as we will explore in the Part III, the reality is more complicated.

In the 1980s, some states enacted a new form of private guardianship—the “standby guardianship”—for the specific purpose of enabling families to avoid state intervention when the need for a guardianship could be anticipated, for example, in single-parent families where the parent had AIDS or another potentially fatal illness.²³¹ Such appointments enabled a parent to ensure that a guardianship was in place and that a person of their choosing could assume the role of substitute parent if the parent became physically unable to care for the child or died²³² while at the same time preventing the child from entering foster care or being cared for by an adult with no legal authority.²³³ As this approach has been available, however, only to a small, narrowly defined set of families,²³⁴ the traditional form of minor guardianship has remained the legal route best suited for pursuing child protection while keeping it in the family.

c. A Route for Some Relative Caregivers to Obtain Custodial Rights

As courts saw more intrafamilial litigation and conflict over the question of who is a “parent,” many relatives caring for children saw guardianship as a route for obtaining legal rights with respect to those children without having to meet the difficult standing and other requirements to establish parentage. When kinship care is provided informally, the household can be subject to “upheaval at the whim of the children’s parent,” as one commentator has described it; that is, if the parent returns from an absence and demands custody of their child.²³⁵ Another observed: “Only a court’s

²³⁰ ELROD, *supra* note 80, at 4:6. *See also* Gleeson & Seryak, *supra* note 9, at 90–94 (describing research findings regarding views of parents of children in informal kinship care).

²³¹ HARALAMBIE, *supra* note 11, at § 11:6. This form of appointment was included in the UNIF. PROBATE CODE § 5-202(c), and the UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 207.

²³² These are distinct from a delegation of parental authority, which is not a court appointed guardianship, and it most useful for travel, military service, or temporary illness. HARALAMBIE, *supra* note 11, at § 11:5; UNIF. PROBATE CODE § 2-105. The parent’s rights are unaffected and can be exercised in conjunction with the delegate.

²³³ McConnell, *supra* note 18, at 255–61. A 1992 report by an epidemiologist in the *Journal of the American Medical Association* estimated that 83,000 minor children in the U.S. would lose their mothers to AIDS. *Id.* at 257 (citing David Michaels, *Estimates of the Number of Motherless Youth Orphaned by AIDS in the United States*, 268 *JAMA* 3456 (1992)).

²³⁴ The appointment of a stand-by guardian is triggered only by death or medically-documented incapacity of the parent. UNIF. PROBATE CODE § 5-202(c). The UGCOPAA provision broadened the potential contexts in which a parental appointment could take effect. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 207. Either provision requires both advance planning (and therefore access to legal knowledge and services) and parental consent, either of which are frequently absent by the time a crisis is identified, thus limiting its use in a wide range of contexts.

²³⁵ Rudasill, *supra* note 192, at 218, 273; *see also* Gupta-Kagan, *supra* note 166, at 46; RELATIVES RAISING CHILDREN, *supra* note 151, at 77

custody order can protect children from the uncertainty and potential risk” of being “bounced from parent and grandparent and back again.”²³⁶ Adoption is not usually the best option for the relative caregiver as it is a winner-take-all contest that pits the caretaker, perhaps a grandparent, against the parent, perhaps the caregiver’s own adult child, and requires them to seek termination of the parent’s rights.²³⁷ Third-party custody laws often require the relative to “frame their claims to rights as *parental* claims,” which is not generally how the caregivers regard their role.²³⁸ For many relative caregivers, by allowing the relative to attain full authority over a child’s care, guardianship is a better route to address concerns about stability and the specter of the “reappearing parent.”²³⁹ Guardianship suspends but does not permanently terminate a parent’s rights. For that reason, parents are more likely to consent to the appointment of a guardian than to an adoption²⁴⁰ or to a court order that provides permanent parental status to the relative.

Because a relative caregiver seeks status as a substitute parent—rather than sharing custody and other rights with a parent—guardianship is a more appropriate mechanism than custody laws for private child protection when a parent’s abilities are limited. Deriving from the traditional tool to aid a minor in the exercise of property ownership, the focus of minor guardianship is on the child’s needs and the parent’s limited ability to meet them. In guardianship appointments, the relationship between the child and the petitioner is not a central question.²⁴¹ While courts prefer to appoint relatives or other adults who have some prior relationship with the child—and some laws contain explicit preferences for certain relatives, such as

²³⁶ RELATIVES RAISING CHILDREN, *supra* note 151, at 77.

²³⁷ Many relatives do adopt children who have been in kinship care. Approximately one in five children are adopted out of foster care by a relative (and presumably in most of those cases, the relative was the foster care placement prior to the termination of the parents’ rights). Berrick & Hernandez, *supra* note 7, at 28. But such formal steps appear unnecessary as a means of committing to raising a child. Studies indicate that even in the absence of formal adoption, a relative’s commitment to caring for and raising the child was not decreased. Mark F. Testa, *The Quality of Permanence - Lasting or Binding Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL’Y & L. 499, 533 (2005).

²³⁸ Murray, *supra* note 35, at 399–405 (emphasis added).

²³⁹ Rudasill, *supra* note 192, at 219, 241 (“Filing for guardianship under the Probate Act is the best choice when the minor child is not in the physical custody of a parent and the sole issue before the court is whether the guardianship is in the best interest of the minor based on the facts and circumstances presented to the court.”). As discussed earlier, some relative caregivers attempt to use so-called “third party” custody statutes, seeking “de facto parent” or similar status as a way to secure rights to the children in their care when there is a dispute with a parent. With the high stakes of the relative being potentially adjudicated as a legal parent of their children, parents are likely to contest these cases. Due to the demanding standing requirements, which require showing of a close relationship between the caregiver and child that is the equivalent to that between a parent and child, relatives often have only limited success. Gupta-Kagan, *supra* note 166, at 50.

²⁴⁰ Ann E. Ross, *Stability in Child-Parent Relations: Modifying Guardianship Law*, 33 STAN. L. REV. 905, 907, 909 (1981) (the guardianship concept, by serving as a middle ground between temporary foster care and permanent adoption, seems to fit the needs of long-term foster children).

²⁴¹ Gupta-Kagan, *supra* note 166, at 47 (noting that one of the aims of third party custody orders is to “protect deep bonds” between the caregiver and the child).

grandparents²⁴²—a parent-like relationship is not a pre-requisite. Indeed, there often is no explicit threshold standing requirement to seek appointment as a child’s guardian.²⁴³ A guardianship petitioner must prove only that they are in a position to fulfill the duties of a guardian and that their appointment is in the child’s best interest. In this respect, the petitioner assumes a role comparable to the state’s in a child welfare proceeding. CPS agency social workers of course have no prior parental role with respect to the children, and the need for state intervention to provide the child with an alternative custodian and caregiver is the key inquiry. However, as discussed in Part III, guardianship’s distinctive features can also present significant drawbacks, particularly for addressing families’ long-term needs.

We have seen how two trends—state intervention in the family and the need for legal status for caregivers—transformed the original and primary use of minor guardianship from a tool to manage the property of legal orphans to a route for relative caregivers to achieve legal status of a child in their care. Part III considers the practical and legal implications for families of using minor guardianship for child protection, particularly where it assumes this function out of necessity rather than legislative design. The efficacy of minor guardianship in this role is assessed below against the generally accepted key policy goals of child protection: that is, to provide children with safe and stable homes; to preserve kinship ties and, in particular, to preserve the parent-child relationship; and, when parents are in crisis, to value the role of extended family in providing care for children.

There are two sets of implications to consider in this analysis. The first are the practical implications of addressing the needs of children and a family in crisis *outside* of the public child welfare system that has been developed over the past 100 years specifically for that purpose. When a family stays out of “the system,” it retains control of the arrangements for the child’s care and avoids the legal and other risks that accompany state intervention. At the same time, however, it loses access to the services, subsidies, and forms of supervision that accompany a formal child protection case. The second set of implications concerns the legal consequences and impact on children and other members of a family in crisis when they seek to address the situation specifically *through minor guardianship*. When a

²⁴² See, e.g., N.H. REV. STAT. § 463:10(V) (2017) (“If a parent’s substance abuse or dependence is the basis for the guardianship petition, the court shall give a preference to any grandparent of the minor who seeks appointment as guardian of the person or the estate, or both, for the minor.”).

²⁴³ See Gupta-Kagan, *supra* note 166, at 62 (advocating for low standing thresholds for third-party custody cases so that children avoid or quickly exit from the foster care system). The other distinction is the precipitating incident. In most guardianship cases, the guardian is already serving as a primary caregiver of the child with the consent of the parent. In third-party custody cases, a person who has (at least allegedly) acted in the role of a parent seeks court-ordered access or physical custody when a dispute arises with the child’s legal parent, such as when a relationship ends or there is intrafamilial estrangement. Some scholars, however, lump them all together. Where there are concerns about abuse or neglect of a child, third-party custody statutes can have the added benefit of preventing state intervention and placement in foster care, just as guardianships. *Id.* at 50.

family uses minor guardianship for this purpose, certain advantages are obtained. At the same time, the needs of the child and family are addressed in the context of probate codes and probate courts, neither of which developed to address the protection of children with living parents.

The analysis of these two sets of reciprocal implications provides a backdrop for the final part of the Article, Part IV. There I propose a number of ways that minor guardianship can be reformed to reduce inequities from the dual public and private child protection tracks and to better serve families where children are in need of protection.

III. THE CONTEMPORARY IMPLICATIONS OF MINOR GUARDIANSHIP AS PRIVATE CHILD PROTECTION

As noted in Part II, some families use minor guardianship specifically to avoid involvement in the child welfare system. This Part will examine more closely why many families have significant concerns about engagement with the system and the implications for those families remaining outside of that system. Other scholars have considered many of these reasons and implications in detail.²⁴⁴ I will only summarize them here to illustrate an important set of considerations for the use of minor guardianship for child protection.

A. Child Protection Outside of the Public System: The Trade-Off for Families

The number of families who attempt to address a parent's crisis outside of the public child welfare system, relying only on informal kinship care, is substantial. As one group of researchers observed: "It is clear that outside of the child welfare system looms a much larger group of private kinship families who may have similar needs [to families in the system] but who are not attached to any comprehensive support system."²⁴⁵ Some children live with relative caregivers in private kinship care arrangements that were encouraged, facilitated, or even required by a child welfare agency after an assessment that the child cannot safely live with their parent.²⁴⁶ Many other families made kinship care arrangements entirely on their own. There is little data about these families precisely because of their limited involvement, if

²⁴⁴ See generally HUNTINGTON, *supra* note 15, at 93–95; GUGGENHEIM, *supra* note 101, at 174–212; WALDFOGEL, *supra* note 126, at 65–93; DOROTHY ROBERTS, SHATTERED BONDS 1–99 (2002).

²⁴⁵ Goodman et al., *supra* note 7, at 288.

²⁴⁶ A 2002 national study by the Urban Institute revealed that 300,000 children reside with kinship caregivers each year as a result of placements by child welfare agencies that have not taken the vulnerable children into state custody. Weisz & McCormick, *supra* note 18, at 203 (citing Jennifer Ehrle et al., *Children Cared for by Relatives: Who Are They and How Are They Faring?*, in THE URBAN INSTITUTE, ASSESSING THE NEW FEDERALISM POLICY BRIEF B-28 1, 5 (2002)); see also Malm & Geen, *Voluntary Placement*, *supra* note 152, at 179.

any, with public agencies.²⁴⁷

Scholars and others draw several distinctions among categories of kinship care, such as public, private, and voluntary, or other categories based on the extent of government engagement, if any, with the family.²⁴⁸ The implications I review below apply to most forms of *private* kinship care, of which minor guardianship is just one.²⁴⁹ While these implications are not unique to families that use minor guardianship, they are true for most such families because pursuing guardianship nearly always means that they are addressing their situation—or attempting to do so—outside of the public child welfare system.²⁵⁰

1. What is Avoided: The Benefits of Staying Out of the Public Child Welfare System

Over the last century, every jurisdiction developed an extensive child welfare system to address the needs of children and families when a parent is unable to serve as a primary caregiver for a child. Many families do their best to avoid this system, however, even when a child is truly at risk of neglect. The primary source of concern by parents, families, and children is a loss of control once a government agency with enormous power to effect permanent and radical change intervenes in a family.

The specter of government workers appearing and taking their child into custody evokes horror for most parents.²⁵¹ For the child's relatives, even if there is concern about the fitness of the child's parent, there is wariness of the state deciding where the child will live and perhaps limiting the relative's contact with the child. For the child, who commonly has only a limited understanding of what is happening, the impact of the intervention may be most damaging.²⁵² In some cases, a child may be interviewed by a stranger, such as social worker or even a law enforcement officer, and asked confusing and difficult questions about their home life.²⁵³ If an emergency removal is ordered by a court, a child may be suddenly taken from their home, friends, pets, school, and the people who love them and know them best, with no one able to tell them when or if they can return. Even if parents have engaged in

²⁴⁷ Goodman et al., *supra* note 7, at 288.

²⁴⁸ Berrick & Hernandez, *supra* note 7, at 25.

²⁴⁹ *Id.* They refer to minor guardianship as “government mediated” kinship care because the government is involved in the form of the probate court.

²⁵⁰ It is not impossible for a family to be involved in both a dependency and minor guardianship case, but those generally arise in one of two situations. First, there is concern about abuse or neglect by the guardian. Second, if a family member brings a minor guardianship proceeding to collaterally attack the dependency proceeding, perhaps to try to attain a kinship placement.

²⁵¹ HUNTINGTON, *supra* note 15, at xvii, 84. Such scenarios can provide dramatic moments in film and novels. The recent film *The Florida Project* effectively depicts the experience of CPS removal of a child from both the parent's and child's perspectives. THE FLORIDA PROJECT (A24 Films 2017).

²⁵² HUNTINGTON, *supra* note 15, at 84.

²⁵³ WALDFOGEL, *supra* note 126, at 67–69.

severe neglect, the child may nonetheless feel a strong bond with them.²⁵⁴ For all concerned, the proceedings are marked by uncertainty and disruption, with the risk of permanent dissolution of the family.²⁵⁵

A child who cannot continue to live with a parent is less likely to experience the trauma of parental separation if they live with a relative rather than non-relative foster parents,²⁵⁶ particularly because the child and parent may continue to have regular engagement.²⁵⁷ Although federal child welfare policy requires states to give preference to placement with relatives when a child is taken into state custody, state agencies do not always do so. Once the child is in state custody, the agency makes the decisions, including placement.²⁵⁸ CPS workers have substantial discretion regarding placement, notwithstanding the federal directives, and they are often reluctant to place children with relatives because of assessments based on the (sometimes dubious) social norms that led to the intervention in the first place,²⁵⁹ and families have good reason to be concerned about the placement of their children with non-relatives. Many “kinship” practices by public agencies are problematic and inequitable.²⁶⁰

The child welfare system can be demanding on relative caregivers serving as foster care families, who must meet federal licensing standards to receive the subsidies granted to foster parents.²⁶¹ Some relatives—even those who had already served as caregivers—are unable to meet these standards. A relative’s approval as foster parents may be delayed significantly because of a criminal history or a determination that their home, due to considerations of size or fire safety, is inadequate.²⁶² Families

²⁵⁴ HUNTINGTON, *supra* note 15, at 85, 118.

²⁵⁵ AECF, *supra* note 158, at 4; Belcher, *supra* note 222, at 25 (noting that one reason parents prefer minor guardianship over dependency is that “the family often experiences a loss of control”).

²⁵⁶ RELATIVES RAISING CHILDREN, *supra* note 151, at 1–2; Duques, *supra* note 6, at 90–91.

²⁵⁷ Gleeson & Seryak, *supra* note 9, at 90–91, 94–95 (describing ongoing engagement of parents, including co-parenting, with children in informal kinship care); Goodman et al., *supra* note 7, at 289. One study found that children in the public child welfare system have decreased well-being due to difficulties from parental neglect and emotional separation. Grandmothers providing private care benefitted from co-parenting assistance and support from the parents due to their ability to remain engaged in the care of their children without approval from the CPS agency. *Id.* at 300–301. *See also* MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES 43 (2015) (noting benefits for case outcomes of kinship placement when children have been removed from their parents’ home).

²⁵⁸ McConnell, *supra* note 18, at 258; Gupta-Kagan, *supra* note 166, at 64; Belcher, *supra* note 222, at 25.

²⁵⁹ Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL’Y 1, 42–46 (2015); Rob Geen, *Kinship Foster Care, An Ongoing, Yet Largely Uninformed Debate*, in KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE 15–19, 63–64 (Rob Geen ed. 2003); Murray, *supra* note 35, at 433–34 (noting that the state will choose whether to value a child’s caregiving network based on “a range of values and normative commitments”).

²⁶⁰ Initially, placing children with relatives often resulted in lower subsidies, a practice that was eventually found unconstitutional by the U.S. Supreme Court in 1979. *Testa & Miller*, *supra* note 136, at 410; *Miller v. Youkim*, 440 U.S. 125 (1979).

²⁶¹ Berrick & Hernandez, *supra* note 7, at 27; Duques, *supra* note 6, at 104.

²⁶² AECF, *supra* note 158, at 4; Gupta-Kagan, *supra* note 166, at 63; Weisz & McCormick, *supra* note 18, at 200.

in these situations often face a particular disadvantage because they are asked to step in unexpectedly, with little if any chance for planning and preparation to receive a child in their homes.²⁶³ By contrast, foster families are pre-approved for placements and simply await a call from a CPS agency informing them that a child will soon be arriving at their home. Because of these potential barriers to kinship placement, extended family remains an underused resource for children in need of protection. As of 2013, approximately 113,000 children, or only about 1 in 4 children in foster care, were placed with family members.²⁶⁴ Evidently, when a child is removed from their parent's care and put into state custody, CPS workers will most often place the child with a *non*-relative foster family.

The concern to families about loss of control regarding a child extends beyond the initial placement determination by the CPS agency. Once the child is in foster care, whether with a relative or non-relative, "the state calls the shots," as one CPS caseworker explained.²⁶⁵ The approaches generally taken by CPS agencies when children are in care have been extensively criticized. Some family advocates have argued that "Government is a poor surrogate for family decision making."²⁶⁶ The child's family is beholden to an under-resourced and overburdened system with a high rate of staff turnover. Parents experience the proceedings as punitive and accusatory with terminology such as "unfit," "neglect," and "jeopardy" used to describe them and their parenting.

Parents and their advocates also complain that the bar a parent must clear to satisfy the state CPS agency to regain custody of a child is beyond their reach, particularly if the agency cannot or does not provide access to all of the services needed to make progress to reunification.²⁶⁷ If a parent has not been able to address the problems that led to the removal within a certain time frame, they face losing custody of their child permanently.²⁶⁸ Federal law imposes strict timelines on states to achieve "permanency" for a child in state custody, and a court must conduct regular reviews of the case for such a child.²⁶⁹ If a child has spent at least 15 out of 22 months in foster care and still cannot be safely returned to their parent's care, then the state must

²⁶³ Berrick & Hernandez, *supra* note 7, at 25; Geen, *supra* note 259, at 68; Gleeson et al., *supra* note 196, at 301.

²⁶⁴ In some states, the placement occurs without court involvement pursuant to a "voluntary placement agreement" that binds the agency, parent, and relative caregiver to a specific set of services and actions. Berrick & Hernandez *supra* note 7, at 27.

²⁶⁵ AECF, *supra* note 158, at 4.

²⁶⁶ *Id.* at 2.

²⁶⁷ See WALDFOGEL, *supra* note 126, at 86, 90–93; Kara Finck, *Negotiating for Services for the Family in Court: Admissions to the Petition*, in REPRESENTING PARENTS IN CHILD WELFARE CASES 133–46 (2015); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1728–31 (2000); ROBERTS, *supra* note 244, at 134.

²⁶⁸ Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89. See also ROBERTS, *supra* note 244, at 105–13.

²⁶⁹ 42 U.S.C. § 675(5)(B) (2012).

seek permission to “cease reunification” efforts and develop a permanency plan for the child.²⁷⁰ Such plan will most likely involve terminating the parents’ rights and making the child available for adoption, perhaps by a foster family. If a child in state custody has been living with a non-relative foster family, that family may be hoping to adopt the child, which can further encourage CPS workers to move towards termination of the parents’ rights. Termination of parental rights legally severs the child’s relationship, not only with their parents, but, unless the child is later adopted by a family member, with their entire extended family, including their siblings.²⁷¹ Thus the child could be lost to another family, not only for the initial placement but forever.²⁷²

By contrast, when a child is in informal kinship care, the family decides what level of contact the parent and child will have and the extent to which the parent has a role in caregiving.²⁷³ In many kinship caregiving arrangements, the parent lives in the same home as the child and relative caregiver, which would not be possible if the child were in state custody.²⁷⁴ And if the family determines that the circumstances giving rise to the arrangement have sufficiently resolved so that the child may return to the parent’s custody, there is no legal impediment to doing so.²⁷⁵

2. How Parents, Children, and Families May Miss Out by Avoiding the System

While there are clearly good reasons for a family in crisis to avoid having a child placed in state custody, there are important benefits attached to such placement that are lost to children, parents, and relatives who remain outside the formal child welfare system.

Many U.S. jurisdictions have developed specific policy goals for the child welfare system and specific features to implement such goals. Of particular significance here are goals that involve family preservation and features that involve individualized assessment and family support. Although such goals are laudable, the actual practices of agencies, courts, and other players often fall far short of implementing the features adequately or serving the goals effectively. The history of the U.S. child welfare system is in many respects an unfortunate one. As many commentators and critics

²⁷⁰ *Id.* § 675(5)(E); WALDFOGEL, *supra* note 126, at 74; McGowan, *supra* note 127, at 29–30.

²⁷¹ HUNTINGTON, *supra* note 15, at 84–85; Sarah Katz, *Termination of Parental Rights, in REPRESENTING PARENTS IN CHILD WELFARE CASES* 293, 312 (2015); Duques, *supra* note 6, at 90–91.

²⁷² Guggenheim, *supra* note 267, at 1737 (noting that “child welfare” was not viewed as “a social problem” to be addressed through broad reforms, but rather “as a matter of individual failure” on the part of a parent); Katz, *supra* note 271, at 312 (noting that agencies may try to focus a TPR hearing on the bond developed between the child and the foster family in support of a “best interest” analysis in a termination of parental rights proceeding).

²⁷³ Gleeson & Seryak, *supra* note 9, at 87, 90.

²⁷⁴ *Id.* at 90.

²⁷⁵ *Id.* at 87, 94.

have observed, not only have policymakers failed to provide that system with adequate resources but, more importantly, they have refused to acknowledge the extent to which the incidence of child abuse and neglect is itself a result of social policy decisions that fail to address acute racial and economic inequality.²⁷⁶ In identifying some of the benefits of the public system and positive features of its design, I do not mean to idealize that system or minimize its significant flaws in practice.

Children at risk of abuse or neglect may not come into state custody for any number of reasons, the most obvious of which is that no one outside of the family is aware of such risk. In many families, another strong factor for remaining outside of the system is that another relative, for example a grandparent or a parent's sibling, has assumed, or is willing to assume, primary care of the child. In some instances, this outcome may be due to the family's initiative to address the child's need for care this way. In other cases, as noted in Part II, it is a kinship diversion strategy initiated by a CPS agency that has identified a relative who can assume "private" care of the child for some time.²⁷⁷ In either instance, remaining outside the system has significant implications for the family.

As the public child welfare system is currently structured in most U.S. jurisdictions, a dependency proceeding is required for a family to have access to the resources and supports provided by that system. Once a child is in state custody, the CPS agency is responsible for assessing the suitability of placement of the child for the duration of such a proceeding. While most children fare better in kinship placements than in non-relative foster families, not all relatives are a good option for providing care.²⁷⁸ When children are in informal kinship care, the agency generally has not made an assessment of the kinship caregiver, including their strengths, possible needs, and home.²⁷⁹ In a dependency case, by contrast, the agency investigates the suitability of the kinship placement and vets the individual family members receiving visitation rights and those supervising parent-child visits. A potential kinship placement may be denied a foster care license due to a serious risk to the child's health or safety that, outside the system, would go undetected. The foster care licensing standards and the way they are implemented is the object of some criticism, but the general framework aims to place a child in a safe home.²⁸⁰

²⁷⁶ See, e.g., Guggenheim, *supra* note 267, at 1735–36; ROBERTS, *supra* note 244, at 25–46; WALDFOGEL, *supra* note 126, at 82–87; Vivek Sankaran, *Is The Solution Really For More Children To Enter Foster Care?*, CHRON. SOC. CHANGE (Aug. 29, 2018), <https://chronicleofsocialchange.org/child-welfare-2/is-solution-really-more-children-entering-foster-care>.

²⁷⁷ See *supra* notes 152–159, 220–223 and accompanying text.

²⁷⁸ Gleeson, *supra* note 37, at 247–48.

²⁷⁹ This is true even pursuant to a VPA or diversion arrangement. Berrick & Hernandez, *supra* note 7, at 26; AECF, *supra* note 158, at 5, 11.

²⁸⁰ Gleeson, *supra* note 37, at 247–48. In 2014, the Annie E. Casey Foundation and the American Bar Association developed new model foster care licensing standards, that “for the first time, help ensure

The prospect of foster care subsidies can provide an opportunity for the relative to get their home into shape to meet licensing standards. And, importantly, a relative who is licensed for foster care placement can receive subsidies and other forms of financial support that are far greater than the Temporary Aid to Needy Families payments under other kinship care arrangements.²⁸¹ Generally, having the state oversee and financially support the child's placement may minimize the chances that a child will be moved from one unstable unsafe home to another within an extended family.

A primary policy goal of public child welfare laws is to reunify a child with their parent as soon as it is safe to do so, and half of all children who are placed in foster care do return to their parents' homes.²⁸² The design of dependency proceedings reflects the assumption that the removal is a temporary arrangement and that the best outcome is reunification. Orders granting custody to the state are presumably structured to give the family the best prospects for arriving at that outcome. To this end, the state is required to develop and implement a reunification plan, sometimes referred to as a "family plan," that includes services, counseling, transportation, and other features that the agency identifies as essential for the family's success based on the reasons for removal.²⁸³ Such plans commonly include a schedule for parent-child contact, with specific conditions for such contact, including location and the presence of a professional or family supervisor.²⁸⁴

If child in state custody has special needs, it is the state's responsibility to ensure that they are addressed. This can translate into the state providing services and support for the child's placement. The state may also order a parent to take specific steps to address the problems that were at the basis for the jeopardy finding, with a timeline for completing them. Such steps may include the parent enrolling in treatment for substance use or mental illness, completing parenting education classes, and other measures tailored to their situation. The family's progress under the reunification plan is monitored by social workers and, based on how the parents and children are

children in foster care are safe while also establishing a reasonable, common-sense pathway to enable more relatives and non-related caregivers to become licensed foster parents." NAT'L ASSOC. FOR REGULATORY ADMIN. ET AL., MODEL FAMILY FOSTER HOME LICENSING STANDARDS 4 (2014), <http://grandfamilies.org/Portals/0/Model%20Licensing%20Standards%20FINAL.pdf>.

²⁸¹ Berrick & Hernandez, *supra* note 7, at 26.

²⁸² HUNTINGTON, *supra* note 15, at 85; Fred Wulczyn, *Family Reunification*, 14 CHILD., FAMILIES, & FOSTER CARE 95, 95–99 (2004). However, agencies also engage in "concurrent planning," in which they simultaneously explore permanency options, such as adoption, for the child in the event that reunification efforts fail. *Id.* at 98; ROBERTS, *supra* note 244, at 111–12.

²⁸³ HUNTINGTON, *supra* note 15, at 62; Hardin, *supra* note 46, at 157.

²⁸⁴ Weisz & McCormick, *supra* note 18, at 212–13; Center for Family Representation, *Achieving the Client's Objectives to Shorten Foster Care Stays and Reunify the Family*, in REPRESENTING PARENTS IN CHILD WELFARE CASES 65, 78 (2015) ("Visitation plays a crucial role for the family throughout the life of [a dependency] case, and research has shown that meaningful and frequent visits between parents and their children are the single best predictor of safe and lasting reunification."); Sonya J. Leathers, *Parental Visiting and Family Reunification: Could Inclusive Practice Make a Difference?* 81 CHILD WELFARE J. 595, 614–15 (2002).

doing, the terms of the plan can be modified as needed. There may also be court-ordered visitation with siblings and other family members to ensure that the child's kinship ties are preserved while in state custody even if they are placed with non-relatives.²⁸⁵

In many states, jurisdiction over dependency proceedings is assigned to courts specializing in cases involving children, including custody and juvenile matters.²⁸⁶ Some of these courts are equipped with child- and family-focused resources including on-staff social workers, child-friendly waiting areas, and other supports.²⁸⁷ The court conducting dependency proceedings may also be part of a Unified Family Court or other problem-solving court based on a therapeutic jurisprudence model.²⁸⁸ Children in the child welfare system are sometimes involved in more than one proceeding at a time (such as a juvenile matter in addition to the dependency proceeding), and the fact that a court system can track and address the child's needs across the cases can be of considerable benefit to the family.²⁸⁹

Dependency proceedings are usually overseen by judges who carry a docket of primarily child-focused cases and have developed expertise, based on specialized training and direct experience, with the many issues that can be implicated, both centrally and peripherally, in child welfare cases. These issues can include substance use, mental illness, child development (physical and emotional), trauma, parenting capacity, and similar concerns that are regular features of dependency cases. This expertise can inform the judge's approval and oversight of the reunification plan, as well as crucial subsequent determinations, such as orders to cease reunification and plans for permanent placement.²⁹⁰

Because of the constitutional implications of state intervention in the parent-child relationship, parents in dependency proceedings have a right to counsel in most states and other due process protections.²⁹¹ If the state proceeds with a petition to terminate the parent's rights, it can do so only if "reasonable efforts" at reunification are first made, after which reunification

²⁸⁵ Some state laws provide grandparents or other relatives with limited standing rights to seek visitation or otherwise participate in dependency proceedings. *See, e.g.*, N.Y. FAM. CT. ACT § 1081(1) (2018); ME. REV. STAT., tit. 22, § 4005-H(1) (2018).

²⁸⁶ JACOBS, *supra* note 54, at § 2:33; HARALAMBIE, *supra* note 11, at § 12:2.

²⁸⁷ *See* Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 CUNY L. REV. 171, 173 (2016).

²⁸⁸ *Id.* at 171–78; *Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2108 (2003).

²⁸⁹ Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L. Q. 147, 149 (1998).

²⁹⁰ *See generally* Hardin, *supra* note 283; WILLIAMS G. JONES, WORKING WITH THE COURTS IN CHILD PROTECTION 7–9 (2006).

²⁹¹ *Santosky v. Kramer*, 455 U.S. 745, 753–70 (1982). Parents have the right to counsel at least at the termination of parental rights stage, if not earlier; The practice varies widely among states. Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 1–2 (2017).

is ruled out,²⁹² and it must meet a clear-and-convincing evidence standard for such termination.²⁹³

The appointment of a guardian *ad litem* for children is a standard feature in dependency cases. The level of qualification and training of such guardians varies greatly, as does their role. Some may be “law guardians” whose role is to advocate for the child’s expressed interests. Others may be tasked by the court to investigate and report on the child’s best interest, as a sort of check on the public CPS agency.²⁹⁴ Some are paid attorneys or mental health professionals, while others may be community volunteers, such as Court Appointed Special Advocates who have gone through a specific training for their role but are not generally professionals.²⁹⁵ Regardless of the model followed, however, every state provides a role for someone other than the family or the state to weigh in on the child’s interests in dependency proceedings.

The state has the full responsibility for prosecuting such proceedings. A relative caregiver, even if they are serving as the foster care placement for a child in custody, is not required to prepare and file any court papers themselves. A relative can seek standing as an interested party in dependency proceedings, but generally they do not need an attorney to do so. Conflicts between family members may arise during proceedings, for example, over kinship placement or permanency planning or when a relative who has served as the placement seeks to adopt the child. But, since the state is unquestionably the lead prosecutor in the proceedings, there is less chance of long-term emotional damage and stress on kinship ties than when relatives are opposing parties in a proceeding.

If a child in custody will not be returning to the care of a parent, the involvement of the state in the child’s placement can have a significant impact on the permanency opportunities for the family. If the child has been placed in the foster care of a relative who wants to adopt the child, the state CPS agency will often provide the resources needed to support that adoption petition.²⁹⁶ Such crucial resources can include access to counsel, assistance with the preparation of the petition, conducting a home study, and performing other critical steps in the process that could present a significant challenge and expense for a relative seeking to adopt the child outside of the

²⁹² 42 U.S.C. § 671(a)(15)(B) (2012); HUNTINGTON, *supra* note 15, at 62; Wulczyn, *supra* note 282, at 97–98. States are not required to make such reasonable efforts in a few narrow categories of cases, such as when a child is the subject of serious physical abuse. 42 U.S.C. § 671(a)(15)(D) (2012).

²⁹³ Santosky v. Kramer, 455 U.S. at 769.

²⁹⁴ See, e.g., N.Y. FAM. CT. ACT § 241 (2018); Diane Somberg, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 529–31 (2015).

²⁹⁵ Katherine Hunt Federle, *Children’s Rights and the Need for Protection*, 34 FAM. L. Q. 421, 426 (2000); Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CTR. FOR CHILD. & CTS. 63, 63–64 (1999). See generally RAMON RUIZ & SCOTT TROWBRIDGE, ABA CTR. ON CHILDREN & THE LAW, NATIONAL SURVEY OF CHILD WELFARE LEGAL REPRESENTATION MODELS (2009).

²⁹⁶ JOAN HEIFETZ HOLLINGER, ADOPTION LAW AND PRACTICE § 3.02(1) (n.d.).

public child welfare system. Also, because, in the dependency proceeding, the parents' rights will have been legally terminated, the petitioning relative does not need to be concerned about obtaining the parent's consent or proving the parent's unfitness. Finally, relatives who adopt a child in state custody may qualify for specific subsidies not otherwise available to them.²⁹⁷

Permanency guardianship—an alternative option for subsidized long-term placement with a relative caregiver—may be ordered only if the child in state custody and has been living with the relative as an approved foster care placement.²⁹⁸ Those guardianships can be modified or even terminated based on the parent's ability to address their specific problems, thus presenting the opportunity for a continued connection with the parent and extended family.²⁹⁹

As becomes clear, families in crisis who choose to use guardianship as a route to address a child's needs without direct state involvement face a significant trade-off. Although they avoid the significant risks of such involvement, as described in the previous section, they are at a significant disadvantage in other ways. As indicated in this section, when a family is on a CPS caseload, the child, parents, and caregiver have access to subsidies, counseling, treatment, and other benefits.³⁰⁰ Parents and children have a path to reunification and receive services specifically aimed at moving them along this path. If such reunification is not possible, a relative caregiver can be part of the permanency plan. Thus, while minor guardianship may initially appear to be a positive turn to avoid a dependency proceeding, relative caregivers who choose it are left with little support and assistance when caring for a child.³⁰¹

In view of the challenges facing households with children needing care, the limited availability of supports and services to relative caregivers outside of the public system is particularly significant. Kinship care households have, on average, higher needs and more limited resources than other households, whether or not there is involvement with the public child welfare system. As compared with caregivers in non-family placements, relative caregivers are older, less educated, more likely to be single, and

²⁹⁷ Katz, *supra* note 202, at 1088–89, 1096–98.

²⁹⁸ See *supra* notes 213–218 and accompanying text; Weisz & McCormick, *supra* note 18, at 210–11.

²⁹⁹ Katz, *supra* note 202, at 1105–09.

³⁰⁰ Weisz & McCormick, *supra* note 18, at 197–98, 212; Duques, *supra* note 6, at 96–98.

³⁰¹ Weisz & McCormick, *supra* note 18, at 200; Zalenski, *supra* note 221, at 27 (“[C]hildren in foster care after a [dependency] proceeding have access to a greater range of services than children in minor guardianships.”). In this respect, parents, caregivers, and children who are not in the child protection system can miss out on the “impressive array of safeguards and services” available through the public child welfare system. Weisz & McCormick, *supra* note 18, at 192 (internal quotation omitted). WILLIAMS, *supra* note 198, at 282; Smith, *supra* note 23, at 70–71 (discussing how families with less several crises that could be best served by in-home services are less likely to get them).

likely to have “fewer material resources.”³⁰² More than half of such relative caregivers are grandmothers.³⁰³ As of 2010, the average age of a caregiver grandparent was 55, with one-third over the age of 60³⁰⁴ and many in poor health.³⁰⁵ The presence of grandchildren in the household may limit the family’s housing options or result in overcrowding.³⁰⁶ And the reason for a grandparent being in a caregiving role may be that the child’s parent—their own son or daughter—is incarcerated or suffering from substance use or mental illness, any of which presents its own set of challenges for the family.

In important individual respects and in terms of the households in which they live, there are many similarities between children in private kinship care and those in the child welfare system.³⁰⁷ In both, a child may have been born drug-affected or experienced significant trauma or instability before coming into the relative’s care.³⁰⁸ In both, the family is likely to have limited material resources and to face serious emotional and practical challenges. Families that address crises outside of the child welfare system have the same significant needs as those involved in the system. What they do not have are the same significant services and supports.

3. Policy Implications of Ideologically and Culturally Shaped Perceptions of Families’ Relation to the Child Welfare System

This Article focuses on the legal and practical implications of using minor guardianships for private child protection. Policies and practices governing guardianship are shaped, however, by broader contemporary views of private kinship caregiving, and there are significant ideological dimensions to those perceptions, often involving matters of race and class. I discuss these dimensions only briefly here because, in the absence of formal data, my observations about them and about their effects on policies and

³⁰² Berrick & Hernandez, *supra* note 7, at 30; Goodman et al., *supra* note 7, at 288–89; Cox, *supra* note 165, at 282 (noting research findings that 20% of families with grandparent caregivers live in poverty as compared with 8.7% of all families). Studies demonstrate that household in which a grandparent is caring for a child, without a parent present, are more likely to be living in poverty with government benefits as a primary or sole source of support. Meara, *supra* note 167, at 130 (citing AARP, GRANDFACTS: NATIONAL FACT SHEET FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN (2015)).

³⁰³ Berrick & Hernandez, *supra* note 7, at 30; Duques, *supra* note 6, at 90.

³⁰⁴ Cox, *supra* note 165, at 282; Meara, *supra* note 167, at 130.

³⁰⁵ Cox, *supra* note 165, at 283 (noting research findings that custodial grandparents are at increased risk of heart disease and chronic health conditions).

³⁰⁶ *Id.* at 291–92.

³⁰⁷ Goodman et al., *supra* note 7, at 289; Duques, *supra* note 6, at 90; CFS FINAL REPORT, *supra* note 196, at 48–51.

³⁰⁸ Cox, *supra* note 165, at 284; Gupta-Kagan, *supra* note 166, at 59. Goodman et al., *supra* note 7, at 296–97 (study comparing grandmothers engaged in public versus informal kinship care in Los Angeles County, California and finding that there are often similar reasons for children to end up in a relative’s care). GA. OFFICE OF THE CHILD ADVOCATE, *supra* note 220. Such history can present additional challenges for the relative caregiver. Cynthia Andrews Scarcella et al., *Identifying and Addressing the Needs of Children in Grandparent Care*, B-55 NEW FEDERALISM 1–4 (2003) (9-13% of children living with grandparents or other relatives “exhibit high levels of behavioral or emotional problems”).

practices can sometimes drift close to the realm of speculation. While the questions raised here can be best explored by social scientists with expertise in these trends (and some have already done so), they require some consideration in connection with the concerns of this Article.

Comparison of public-versus-private approaches to protecting the children of parents in crisis is complex. Part of that complexity arises from the often sharply different ways the alternatives are perceived. Involvement by public agencies in the family in the U.S. today tends to be viewed in distinctly negative ways by those who consider themselves conservative. This tendency, which has been evident since the public child welfare system was first developed more than a century ago,³⁰⁹ reflects the “small government” orientation of conservatives, including many of those in positions of authority with regard to child welfare, whether through election to public office or other avenues of political influence. Former President Ronald Reagan, a hero of this orientation, once famously quipped at a news conference: “I think you all know that I’ve always felt the nine most terrifying words in the English language are: I’m from the Government, and I’m here to help.”³¹⁰ Although he was referring on that occasion to trade and tax policies and their impact on farmers, the quip reflects a more general conviction that government assistance is a sign of failed policy. Not surprisingly, Reagan’s words and sentiment are often invoked by those seeking to limit social services to children and families through public agencies.³¹¹

Those who view government involvement in ways that align with this perspective and who—in courts and legislatures as elsewhere—see placing a child in state custody as inherently undesirable, are among the key proponents of kinship diversion practices and of minor guardianship.³¹² A Vermont probate judge praised minor guardianship as a way for a family to “step up and take custody of the child.”³¹³ An analysis of the debate over kinship diversion conducted by the Annie E. Casey Foundation concluded that people’s view of whether or not the practice was beneficial depended on how they generally saw the role of government versus the family in addressing a problem.³¹⁴ Another way that those suspicious of the welfare

³⁰⁹ HUNTINGTON, *supra* note 15, at xvii–xviii, 68–69.

³¹⁰ This quote was followed with criticisms of farm, trade, and tax policies. UNIV. CAL. SANTA BARBARA, THE AMERICAN PRESIDENCY PROJECT: RONALD REAGAN: THE PRESIDENT’S NEWS CONFERENCE (1986), <http://www.presidency.ucsb.edu/ws/?pid=37733>.

³¹¹ HUNTINGTON, *supra* note 15, at 78–79 (arguing that much of the libertarian and conservative rhetoric about family autonomy is based on “an inaccurate view of the actual the relationship between families and the state” making it “easier to pathologize those families whose dependencies are more visible”); Murray, *supra* note 35, at 394–95, 436–37 (noting that some see the “most important function that the family serves is the privatization of care for dependent members, usually children”).

³¹² While 12 states expressly prohibit kinship diversion, most states appear to use or promote it to some degree. Berrick & Hernandez, *supra* note 7, at 26.

³¹³ Belcher, *supra* note 222, at 25.

³¹⁴ AECF, *supra* note 158, at 1–2.

state can keep children away from the government (and vice versa) is exemplified in the faith-based non-profit organization, Safe Families for Children, which has created a network of volunteers, largely recruited and organized through churches, to care for the children of families in difficulties.³¹⁵

Consistent with the alignment of views just described, much of the *criticism* of private diversion practices, including minor guardianship, originates with those with a liberal orientation who generally advocate for increased public services for children and families through a strong welfare state. Legal scholar Sacha M. Coupet has critiqued what she sees as the broad political motives for the “privatization” of child welfare. She comments:

A pervasive philosophical shift at the federal level prior to, and particularly throughout, the Reagan administration prompted movement away from “the public commitment at the heart of the Great Society programs of the 1960s and [early] 1970s and toward individual and private solutions to social problems.” No area of social service emerged unscathed, and the shift inevitably set the stage for a diminished governmental presence in child welfare service delivery.³¹⁶

These critics of kinship diversion and minor guardianship commonly stress the ways such practices place the child and family, especially those in poverty, at a disadvantage compared with children and families involved in

³¹⁵ See SAFE FAMILIES FOR CHILDREN, *About Us*, <https://safe-families.org/about/> (last visited Apr. 13, 2019). SFFC’s policy initiatives are advanced by a conservative think tank that primarily addresses welfare reform and anti-union matters. See, e.g., Testimony of Andrew Brown, Senior Fellow with the Foundation for Government Accountability, in support of Maine LD 1065 (April 21, 2016) to make it easier for Safe Families for Children (SFFC) to step in and assume voluntary custody of a child. (“The bill before you today is based on the basic value of neighbors helping neighbors.”), <http://legislature.maine.gov/bills/getTestimonyDoc.asp?id=29303>; FOUNDATION FOR GOVERNMENT ACCOUNTABILITY, <https://thefga.org> (last visited Apr. 13, 2019). See also *Sugar Frosted Foster Care*, NAT’L COAL. FOR CHILD WELFARE REFORM, <https://www.nccprblog.org/2009/05/sugar-frosted-foster-care.html> (last visited Apr. 13, 2019) (discussing risks to parents of “voluntary” placements with SFFC).

³¹⁶ Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services*, 11 CHAP. L. REV. 85, 99 (2007) (quoting MADELYN FREUNDLICH & SARAH GERSTENZANG, AN ASSESSMENT OF THE PRIVATIZATION OF CHILD WELFARE SERVICES: CHALLENGES AND SUCCESSES 13 (2003)). Coupet observes that one of the “troubling” risks of this privatization is “diminished accountability, which in turn poses a greater risk of harm in the event that private providers fail to meet acceptable standards of service delivery.” *Id.* at 99. Her concern is borne out in a recent case in North Carolina, where a child welfare agency was placed under formal investigation due to its use of VPAs and other kinship diversion practices to effectively remove children from their homes “without the required oversight of the court system.” Jason Beck, *State officials assume operations of Cherokee County child welfare services*, FETCH YOUR NEWS (March 22, 2018), <https://cherokeenc.fetchyournews.com/2018/03/22/state-officials-assume-operations-of-cherokee-county-child-welfare-services/>.

dependency proceedings.³¹⁷ They also point out that, while guardianship permits a family to avoid the uncertainty and disruption of a child dependency proceeding, it also potentially allows a child to remain in an unsafe situation and permits the state to avoid the obligations of providing services to the family.³¹⁸

If we shift our view of the comparison between minor guardianship and child welfare services from ideological debates about the role of government in addressing social problems to the perspective of the families that have received the most scrutiny from public child welfare agencies, we see the alternatives in terms of a very different sense of risks and benefits. These are families at the margins rather than centers of power. While their advocates argue that they are entitled to government assistance, they are themselves often quite wary of such “help.” While there are deep roots for kinship care practices in many cultures and societies, interfamilial care has had a particularly important role in U.S. African-American communities.³¹⁹ In these and other communities of color, the self-sufficient “nuclear family” has never been set as the ideal for a household or childrearing configuration.³²⁰ Challenges presented to families in these communities by economic, social, and political pressures has often obliged them to look within their own kinship networks for assistance and support.³²¹ And in fact, for generations, families in these communities have employed child protection systems of their own. They have done so in part to avoid any engagement with the government: not, however, for ideological reasons but because the risks of such engagement are multifold, substantial, and pose very real threats to their survival as families.

As noted and documented by many scholars, the broad definitions of “abuse,” “neglect,” and parental “unfitness” employed in the child welfare system allows CPS workers to apply them to family arrangements that fall outside tacit social norms that are themselves often shaped by biased assumptions about race, culture, religion, gender, disability, and class.³²² Such biases can be reflected in how agencies target families for disruption

³¹⁷ AECF, *supra* note 158, at 5–9; Zalenski, *supra* note 221, at 28. Some suggest that kinship diversion has an especially adverse impact on poor families of color. AECF, *supra* note 158, at 6.

³¹⁸ Smith, *supra* note 23, at 70–71; ACT 56 MINOR GUARDIANSHIP COMM., *supra* note 190.

³¹⁹ Coupet, *supra* note 129, at 602; Berrick & Hernandez, *supra* note 7, at 24; ROBERTS, *supra* note 244, at 7.

³²⁰ Coupet, *supra* note 129, at 605.

³²¹ Coupet calls it a “rich system of interdependence.” *Id.* at 606–607. Scholars have noted the longstanding and valued practice of informal “adoption” of children by relatives in African-American families. This often occurs due to the death, divorce, or poverty of their parents, and may happen when the children are quite young. Leashore, *supra* note 197, at 396–97. *See also* Gleeson & Seryak, *supra* note 9, at 94–95.

³²² *See* HUNTINGTON, *supra* note 15, at 73–76; Guggenheim, *supra* note 267, at 1735–36; Martin Guggenheim, *General Overview of Child Protection Laws in the United States in Representing Parents, in REPRESENTING PARENTS IN CHILD WELFARE CASES 1* (2015) (noting that the term “neglect” can refer to a “temporary lapse of care on the part of the parent, often involving some degree of willfulness” and that status can be either quite detailed or “couched entirely in broad phrases”).

and dissolution.³²³ For some communities, the bar for government intervention has been shockingly low. The experience of Native American families that led to the enactment of the Indian Child Welfare Act (ICWA) in 1978 is perhaps the starkest and most tragic example of the effect of these biased social norms. Thousands of Native children were removed from their families based on the assumption that they needed to be “rescued” from conditions seen as inferior and exposed to the majority culture to ensure they would be able to assimilate and succeed in the majority society.³²⁴ The widespread practice was halted and remains in check only by the enactment of ICWA by Congress.³²⁵

More recently, figures on the racial makeup of the families from whom children have been removed reveals serious disparities and inequities, with African-American families as the overwhelming majority of CPS caseloads in urban communities.³²⁶ The nebulous conceptualization of parental “unfitness” leaves much to the discretion of caseworkers. Actions and conduct that would be considered unremarkable in middle- and upper-class white families—such as alcohol and drug use—and that fall far short of physical abuse or abandonment serve as grounds for removal of the children in poor, urban families.³²⁷ Under this approach to parental “unfitness,” other relatives in the family may be considered not as resources for alternative care but rather as part of the problem from which children need to be removed—the “apple doesn’t fall far from the tree” assumption. As was true of immigrant families in urban settings at the turn of the century³²⁸ and of Native American tribal members for decades after that, marginalized groups have always been particularly vulnerable to intervention.³²⁹ Instead of

³²³ ROBERTS, *supra* note 244, at 16–25; HUNTINGTON, *supra* note 15, at xix, 73–76.

³²⁴ ROBERTS, *supra* note 244, at 248–51; Murray, *supra* note 35, at 419; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (acknowledging the practice of “unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts”).

³²⁵ Pub. L. No. 95-608, 92 Stat. 3069 (1978), *codified at* 25 U.S.C. §§ 1901–1963 (2012).

³²⁶ See ROBERTS, *supra* note 244, at 6–10 (describing the acute and longstanding problem of discrimination against African-American families in the child protection system and describing “the foster care system in the nation’s cities” as “an apartheid institution.”). HUNTINGTON, *supra* note 15, at 45.

³²⁷ HUNTINGTON, *supra* note 15, at 94 (noting that the majority of cases in which a state removes a child from the home are based on “poverty-related neglect, which typically involves substance abuse, inadequate housing, or inappropriate child-care arrangements.”). The vast majority of family interventions of any kind by public CPS agencies—about 75%—are to address cases of perceived “neglect”; 18% involve allegations of physical abuse.” *Id.* at 44–45. Racial inequality in mass incarceration has a spillover effect in this realm as well. See Dorothy E. Roberts, *Prison, Foster Care, and Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1491–1500 (2012).

³²⁸ HUNTINGTON, *supra* note 15, at 75.

³²⁹ These practices were reminiscent of the 19th Century “orphan trains,” an early form of “foster care.” Although they may have stated benevolent purposes, the measures are harsh by today’s standards. The Children’s Aid Society of New York developed a program to “save” poor children, generally from Catholic immigrant families, from urban life by sending thousands of them to foster families in the Midwest via the so-called “orphan trains.” These early “free foster homes” were criticized as little more than indenturing since the children were expected to provide labor, and many of the children were not in

permitting children in such communities to be cared for by other family members, CPS workers plucked them from this worrisome “element” and placed them in overcrowded institutions³³⁰ or with foster families far different from their own. In short, families of color and low-income families have long had good reason to take care of problems within the family.³³¹

It seems, then, that advocates and analysts across the political spectrum—regardless of the broader narrative they are trying to serve—agree that state intervention at the expense of kinship ties reflects poor policymaking. Given this shared sentiment, in the final part of this Article I suggest some possible routes to common ground on better policies for children and families in crisis.

B. Child Protection in Probate Codes and Courts: The Mismatch Between Traditional Purposes and Contemporary Uses

The previous section explored how the public child welfare system responds when a parent is judged unable to provide care for a child and considered the general implications for families when such concerns are addressed in some other nominally private way, either by kinship diversion or a voluntary placement agreement of some kind. This section considers the specific implications of private kinship care for families who use minor guardianship to provide a relative with legal authority with regard to the child in their care. For these families, in addition to the various consequences—positive and not—of staying out of the public child welfare system, there are specific implications of bringing the matter into the state courts and of being subject to codes linked with probate matters.

As discussed above (Part II.B.), although most guardianship laws today have persistent core features that reflect the laws’ historical origins and purposes, minor guardianship is now used in a context far different from that

fact orphans. McGowan, *supra* note 127, at 14. The goal was not just to remove children from their parents, but from their “elements” and a wholly different culture.

³³⁰ HUNTINGTON, *supra* note 15, at 75.

³³¹ Gleeson, *supra* note 37, at 246. The depiction of child protection alternatives in J.D. Vance’s recent bestselling memoir, *Hillbilly Elegy*, provides a good example of this complex political and cultural dynamic. Vance, who is white and identifies himself as a conservative Republican, describes how he was raised by his working-class grandmother “Mamaw.” He lied about the abuse and neglect he experienced while living with his mother to ensure that he could remain with his grandmother rather than be taken into state custody. J.D. VANCE, *HILLBILLY ELEGY* (2016). As the author explained in an interview with Terry Gross on NPR’s “Fresh Air”:

[A] lot of times, [] child welfare bureaucracies ignore these extended networks of kin that are really important to these children's lives. And so that's one of the things I found when I was a kid - is that I wasn't really given an opportunity by the child welfare worker to go and live with mamaw and papaw, which is what I wanted to do. What I was given - *an opportunity was to either shut up or to go live with a complete stranger.*

'Hillbilly Elegy' Recalls a Childhood Where Poverty Was 'The Family Tradition,' FRESH AIR, NATIONAL PUBLIC RADIO (Aug. 17, 2016), <https://www.npr.org/2016/08/17/490328484/hillbilly-elegy-recalls-a-childhood-where-poverty-was-the-family-tradition> (emphasis added).

giving rise to its original design. Significantly here, it is now operating primarily as a private child welfare law to address the same concerns with child protection that give rise to intervention by public agencies. Clearly, guardianship laws reflect a significant mismatch between their historical design and their contemporary use. The laws and the courts that administer them are poorly equipped to support the policy goals of child protection and family preservation.³³² Indeed, in failing to serve those goals, they can in fact undermine them, with significant consequences for the children and families involved.³³³

1. A Policy Goals Framework to Evaluate Minor Guardianship for Child Protection

I have used the term “child protection” in this Article to refer to judicial intervention and related measures to address a child’s needs when a parent is limited in their ability to provide appropriate care.³³⁴ In this section, I assess the effectiveness of minor guardianships as a tool for child protection so defined. The evaluation of any measure taken to address child protection must focus on the extent to which they serve identified policy goals. Where it has been determined that a parent cannot provide care for a child, the key questions are: what is an *appropriate* response and what is a *successful* outcome. As reflected in the development of the U.S. child welfare system (and driven largely by federal funding priorities), the primary aims of such interventions could be described as, first, ensuring that a child is not facing an intolerable risk of abuse or neglect and, second, maintaining the parent-child relationship if it can be done so “safely,” as that term is understood by agencies and courts, within a timetable.³³⁵ In light of more recent developments, however, I would frame the implicit overarching policy goal of child protection law today somewhat differently and more broadly: protecting children from harm *while* valuing and preserving kinship ties to the greatest extent possible. I explain this difference as follows.

The aforementioned broad goal of child protection includes three interrelated strategies to serve that goal. The first and most obvious of these is ensuring safety and stability for a child determined to be at risk of abuse

³³² Zalenski, *supra* note 221, at 27 (“The fact that both of these proceedings could be used effectively to remove a child from a parent’s custody when concerns arise about the child’s safety or the parent’s suitability as a caretaker initially may disguise critical differences between the proceedings.”).

³³³ Weisz & McCormick, *supra* note 18, 191–92.

³³⁴ See Nigel Parton, *Comparing Child Protection Systems*, in THE ROUTLEDGE HANDBOOK OF GLOBAL CHILD WELFARE 229–32, 236 (Pat Dolan & Nick Frost eds., 2017) (describing orientation of U.S. child protection system, as compared with other forms of child welfare).

³³⁵ HUNTINGTON, *supra* note 15, at 61; WALDFOGEL, *supra* note 126, at 74, 78–79. Of course, the extent that each of these concepts of “intolerable,” “risk,” “neglect,” and “safely” applies in a given case is often in dispute in dependency proceedings.

or neglect.³³⁶ This strategy is often best implemented by also protecting kinship ties, thereby ensuring that children are being cared for in their family home. Children who live in homes where they are safe and supported can grow, learn, and thrive, and therefore emerge as an engaged member of that family. Conversely, allowing a child to remain in a harmful situation in their own home can lead to instability and trauma that can permanently damage the child's relationships with their parents and perhaps with other family members as well.

There are many ways to ensure children are safe. The U.S. child welfare system is one that, at least in principle, seeks to do so within the context of the second major strategy: that is, protecting the parent-child relationship—in both legal and nonlegal respects—by intervening only if and to the extent it is necessary. While a child has important relationships with many adults, including non-parent relatives, throughout their childhood, the connection with their parents has unique legal and psychological significance.³³⁷ Parents are never perfect, and many family homes and childrearing approaches are or could be the object of valid criticism and judgment. But child welfare laws are based on an assumption that most of those situations do not justify intervention. Rather, our laws reflect the finding that children should live with their parents to the greatest extent possible. This is not only a public policy goal based in social science research; it is a fundamental constitutional right.³³⁸ As it stands, child protection laws—whether public or private—reflect this right by not intervening between children and parents unless necessary. But our laws should also address the conditions that *lead to* the need for intervention, that is, the economic, gender, and racial inequalities that can lead to a family crisis (a parent's incarceration, substance use, mental illness, and so forth) and to the neglect and abuse of children. Laws addressing these conditions are the most effective prevention services we can provide to families and the most effective protection services we can provide to children.³³⁹

The third strategic component of the broader goal of protecting children *while* preserving kinship ties is to recognize the potential role of extended family in supporting both children and parents in crisis. As discussed previously, when the state intervenes to protect a child, an entire family is at

³³⁶ As many critics have noted, U.S. society has not embraced a broader goal of ensuring the welfare of all children, including preventing childhood policy and addressing their health needs. The focus of our child welfare system is predominantly on addressing children at risk of abuse or neglect. *See, e.g.,* Guggenheim, *supra* note 267, at 1735–40.

³³⁷ ROBERTS, *supra* note 244, at 159; Godsoe, *supra* note 217, at 129–34; Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715, 730–32 (2015).

³³⁸ HUNTINGTON, *supra* note 15, at 61. *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981) (“[A] parent’s desire for and right to ‘the companionship, care, custody and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

³³⁹ HUNTINGTON, *supra* note 15, at xiii.

risk of the impact.³⁴⁰ Valuing the potential role of the extended family in meeting the two other components of this goal requires engaging non-parent relatives as potential resources and, no less significantly, limiting the extent to which intrafamilial relations are strained by litigation and conflict. Unless it is managed with care, litigation involving allegations of neglect or other potential forms of parental unfitness can drive a wedge into families that leaves lasting scars.³⁴¹ Unlike the litigants in a personal injury or contract case, family members will need each other beyond the time the litigation is pending, and indeed far longer than the minor's childhood.³⁴² Through adversarial litigation, however, familial ties for the child can be weakened, not strengthened.³⁴³ Court filings and testimonial evidence filled with disparagement and blame can widen rifts in the family precisely at a time when support and interdependence is most needed.³⁴⁴ Because family members—for example, a child's grandmother and mother—know each other well and the stakes involved are great, emotions can be extreme.³⁴⁵ Intergenerational family conflicts are among the most painful and damaging I have encountered in legal proceedings.

2. Using Probate Codes for Child Protection

The specific implications for families of using guardianship for private child protection can vary greatly from state to state or even within states. How families are affected depends on how minor guardianship matters are classified under state law. Many minor guardianship statutes are still within the state's probate code while others are located with the statutes for other family laws statutes. Those minor guardianship laws that remain in state probate codes tend to reflect the traditional orphan model for using such appointments. A 2003 study by Casey Family Services of guardianship in Connecticut courts noted in its summary of major themes: "Most striking was the reflection from many around the state that the Probate Courts operate according to an older set of rules that do not necessarily apply

³⁴⁰ The current federal public child welfare goal of "permanency" has been extensively criticized for undermining family bonds in the interest of moving children out of the system too quickly and valuing *binding* rather than *lasting* ties, which has had the effect of undermining the overall goal of preserving kinship ties. Gupta-Kagan, *supra* note 146, at 32–37. There is no evidence that the results of these policies and practices have been good for children and much to suggest that they have not. *Stability*, by contrast, can be found through maintaining ties that run deep. See Testa, *supra* note 237, at 524–34; Katz, *supra* note 202, at 1090–96.

³⁴¹ RELATIVES RAISING CHILDREN, *supra* note 151, at 78; HUNTINGTON, *supra* note 15, at xii.

³⁴² HUNTINGTON, *supra* note 15, at xiii–xiv.

³⁴³ Coupet, *supra* note 129, at 609–10.

³⁴⁴ See Newman, *supra* note 167, at 27–31 (discussing potential harm from GVA litigation when family already dealing with death, divorce, or conflict).

³⁴⁵ HUNTINGTON, *supra* note 15, at 84 ("The people involved in family disputes often know one another on the deepest personal level and are likely to have, as nearly all people do, complicated, emotional relationships with particular histories.").

anymore to current guardianship matters.”³⁴⁶ As will be seen, the impact of using guardianship for child protection in specific cases will depend on how far a state has moved its minor guardianship laws and procedure from its orphan model origins. The discussion below focuses primarily on states that retain minor guardianship laws in their probate codes, including those based on the UPC or UGPPA, as many of these potential implications are likely true to at least some degree in all states.

Under any version of the ULC’s uniform laws, provisions for minor and adult guardianship are largely parallel. The association between minor and adult guardianship reflects their common origin. As discussed above (Part II.A.),³⁴⁷ both were developed to address the legal disability of so-called “imbeciles, idiots, and infants,” specifically to manage their property. In some states, a single statute covered all the categories of “protected” persons who needed to have a guardian appointed, with no distinctions in the procedures, standings, powers, or duties. While most state laws now have a separate section for each kind of guardianship, they maintain this close alignment. Under the uniform laws, there is a common set of “General Provisions,” which applies equally to both adult and minor guardianships,³⁴⁸ and similar language in many of provisions specific to each category. Evidently, the drafters of these provisions aimed to preserve consistency between the two aspects of the law,³⁴⁹ and, in many instances, such common terminology or provisions are appropriate and useful.³⁵⁰ As minor guardianship is increasingly used for child protection, however, aspects of these parallel provisions are clearly inappropriate or counter-productive.

A key distinction between adult and minor guardianship is the protected interest that may be compromised by the appointment of a guardian.

³⁴⁶ CFS FINAL REPORT, *supra* note 196, at 48.

³⁴⁷ WOERNER, *supra* note 38, at 1–2 (explaining origins of legal guardianship as providing a means by which minors and “persons of unsound mind” could enjoy their property while they lacked the ability to “legally dispose of or control” their property).

³⁴⁸ UNIF. PROBATE CODE §§ 5-101–5-117; UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT §§ 101–127.

³⁴⁹ During the initial development of the UGCOPAA, the ULC Drafting Committee specifically discussed whether the uniform guardianship law should continue to include provisions for both minors and adults. The Summary of the October 9-10, 2015 Drafting Committee meeting reflected that there was discussion and “some disagreement about whether minors should be included.” But the committee concluded that “separating the two might be outside the scope of this Committee’s charge” and ultimately decided to maintain the provisions for minors in the new uniform act. Summary available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e95f23b4-9ab4-9443-9ea3-ca3717b098ec&forceDialog=0>. During the drafting process, including the final stages in which I was an observer, the Drafting Committee reflected less concern with adhering to consistency between the adult and minor provisions than is reflected in the prior uniform guardianship laws, and the committee specifically considered the implications of the *Troxel* opinion on guardianship determinations. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT, prefatory note 4. Nonetheless, the new uniform act preserves the common “General Provisions” and substantial parallels between the adult and minor provisions.

³⁵⁰ See, e.g., UNIF. PROBATE CODE §§ 5-207, 5-314 (“Duties of guardian”); UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT §§ 209 (“Duties of guardian of a minor”), 313 (“Duties of guardian of an adult”).

Specifically, while the appointment of a guardian for an *adult* is a limitation on *that adult's* fundamental constitutional rights, the appointment of a guardian for a *minor* infringes on the liberty interests of the minor's *parents*. However, because the uniform laws continue to group both guardianships together and the changes in the laws have been driven largely by those who work with *adult* guardianships, such as scholars and practitioners of disability or elder law, the emphasis on reform in guardianship law has been on enhancing the rights of the “wards” or the persons under guardianship.³⁵¹ This orientation means that the objectives of reform have not focused on expanded protections for parents' constitutional interests. The result is that various reforms in the realm of family and child protection, including the increased recognition of the constitutional implications of interfering with the parent-child relationship, have not been incorporated widely into guardianship statutes. As long as legislators and those drafting uniform law strive to maintain consistency between minor guardianship and the rest of a probate code, especially adult guardianship, it risks being significantly out of step with the policy goals of child protection and maintenance of kinship ties.

a. Does Minor Guardianship Protect Children?

On one level, minor guardianship is well-suited for providing safety and stability for children. It grants a caregiver legal custody and the full legal authority they need to provide care for a child. At another level, however, it is not well designed for that strategy. For example, requirements for the selection of a guardian appointed through a typical probate code process are far less stringent than those required in the rigorous process for approval of a kinship foster placement.³⁵² During the initial appointment process, the assessment tends to be focused more on a parent's limitations than on a potential guardian's suitability to step into that role. Some state laws have categorical exclusions—based on age or criminal history—for eligibility to be appointed as a guardian, but most say little about the qualifications or vetting process.³⁵³ State laws also vary widely in terms of the extent to which a court must investigate the suitability of a guardian prior to appointment.³⁵⁴ Some explicitly require the petitioner to be a relative already serving as a child's caregiver, and most courts demonstrate a preference for kinship placement in practice. While most statutes do not include an explicit kinship

³⁵¹ See UNIF. PROBATE CODE, prefatory note to Article V, 491–92; UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT, prefatory note 2–4.

³⁵² Berrick & Hernandez, *supra* note 7, at 26.

³⁵³ JACOBS, *supra* note 54, at § 7.15; see, e.g., ILL. COMP. STAT. ANN. Ch. 755, § 5/11-3(3) (2015) (prohibiting those of “unsound mind” or convicted of a felony, with some exceptions, from appointment as a guardian of a minor); MO. ANN. STAT. § 475.055 (2018) (“no incapacitated or disabled person, and no habitual drunkard shall be appointed guardian of the person or conservator of the estate”).

³⁵⁴ JACOBS, *supra* note 54, at § 7.15

preference, that is the practice of many courts.³⁵⁵ Generally, however, the standing requirement is undemanding.³⁵⁶

Once appointed, a minor guardian's responsibilities with respect to the child are, under most guardianship statutes, quite generic and modest. Laws often include seemingly archaic language, for example, imposing the duty to "become or remain personally acquainted with the ward and maintain sufficient contact with the ward."³⁵⁷ Such language makes sense when applied to an adult guardianship, but seems odd and is certainly meager when describing the duties of someone who will be a primary caregiver for a child. In sharp contrast to dependency proceedings, there is little if any monitoring of the guardianship or the child once the appointment is made.³⁵⁸

The failure of minor guardianship to address the needs of children, and especially the children of families in crisis, is most evident in the virtual absence of services and support for a child who has someone appointed their guardian. As detailed in the preceding section, many of the financial, treatment, and advisory resources most valuable for families in crisis are only available through the public child welfare system. Guardians may not be eligible for financial assistance beyond a TANF grant or food assistance benefits, and the appointment does not provide access to specialized treatment for conditions such as mental illness or addiction. A minor guardian is empowered to make determinations about the child's needs and to seek services, just as a parent would. Unless, however, a guardian specifically attempts to locate appropriate and available services and is successful in doing so, no services will be provided.³⁵⁹ While many guardianship statutes permit a court to order parents to pay child support to the guardian, parents in crisis are not usually in a position to do so and subsidies for the purpose are available only through special programs for permanency/kinship guardianships.³⁶⁰ And, of course, under most contemporary guardianships, the minor has no independent income or property. This means that a child for whom a guardian is appointed will likely be in a household with few resources available to meet either the

³⁵⁵ JACOBS, *supra* note 54, at § 7.16 ("When the parents are deceased, all things being equal, relatives are preferred to others."). Some state laws give preference to the person nominated by the minor, if 14 or older, the parents, if alive, and after that, "preference is usually given to close blood relatives and relatives with whom a minor resided more than six months." *Id.*

³⁵⁶ CFS FINAL REPORT, *supra* note 196, at 49 (noting a lack of screening process for guardianship petitions); JACOBS, *supra* note 54, at § 7.15 (noting that the general requirement for appointment as a guardian is that the person is a "suitable adult"); *see, e.g.*, COLO. REV. STAT. ANN. § 15-14-206 (2018) ("The court shall appoint a guardian whose appointment will be in the best interest of the minor").

³⁵⁷ UNIF. PROBATE CODE § 5-207(b)(1); *see also* UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 209(b)(1) ("A guardian for a minor shall [] be personally acquainted with the minor and maintain sufficient contact").

³⁵⁸ CFS FINAL REPORT, *supra* note 196, at 48-49.

³⁵⁹ *Id.* at 48-49.

³⁶⁰ *Id.* at 49.

child's or the guardian's specific needs.³⁶¹

The role in guardianship proceedings given to children themselves by current laws could be seen as a positive or negative feature, depending on one's perspective. The long-standing provisions that give the equivalent of party status to minors age 14 and older in guardianship proceedings can be contrasted with the very limited status minors have under most family law statutes, which generally speak only of a child's best interests, reflecting the court's *parens patriae* role in such proceedings (for example, the determination of custody in a divorce). As noted above,³⁶² most state guardianship laws require that minors age 14 or older be served notice of the proceedings, with an express or implied right to attend, and grant older minors the right to consent or object to the appointment of a guardian, even one who has been nominated by parent.³⁶³ The newest uniform guardianship law expands these provisions by, among other things, lowering the age of engagement to 12 and *requiring* the minor to attend the proceeding unless a specific exception applies.³⁶⁴ These revisions giving more minors a greater role in the proceedings reflect parallel reforms for adult guardianships.³⁶⁵

By contrast, in proceedings involving custody determinations (for example, divorce and dependency), family courts are wary of involving children too directly in disputes regarding their care and custody.³⁶⁶ This is one reason for the prevalent use of court-appointed attorneys or guardians *ad litem* in most states.³⁶⁷ The appropriate role of a child in adversarial family law proceedings is unsettled and the subject of extensive debate.³⁶⁸ The issue is not resolved by the language in guardianship statutes, which

³⁶¹ See *supra* notes 302–308 and accompanying text.

³⁶² See *supra* notes 102–105 and accompanying text.

³⁶³ The states with lower ages include California and Colorado use, which uses age 12 for their notice and consent provisions, CAL. PROB. CODE § 1510 (2014); COLO. REV. STAT. § 15-14-206 (2001), and South Dakota sets the age at 10 for notice and appearance (but for consent the age is still 14), S.D.C.L. §§ 29A-5-204, 208.

³⁶⁴ UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT, prefatory note 4, § 203(a)(1)(A). The UGCOPAA Drafting Committee lowered the age to 12 to be consistent with the consent age in the Uniform Adoption Act (UAA). UGCOPAA Drafting Committee, Summary of April 17-18, 2015, Meeting at 5, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=fe048691-ec73-dfc0-f089-391048526e8c&forceDialog=0>. However, Vermont, the only state to adopt to adopt the UAA, set the consent age at 14. 15-A V.S.A. § 4-201. The two scenarios (guardianship and adoption) may not be analogous for these purposes. In an adoption case, the child's consent is a one-time question about a permanent familial relationship. By contrast, in a guardianship, the child will receive notice and potentially be involved in the appointment and post-appointment proceedings.

³⁶⁵ UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT, prefatory note 1–2.

³⁶⁶ Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 642 (2003); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 124 (1997).

³⁶⁷ Atwood, *supra* note 366, at 632, 636.

³⁶⁸ Donald N. Duquette & Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 91–94 (2012); Atwood, *supra* note 366, at 631; Weinstein, *supra* note 366, at 124.

says nothing about the child's role in matters of care or custody. A guardian has long been understood as a *fiduciary* appointed by the court to replace a parent who, traditionally, was given a legal role more like a child's owner than as a provider of care.³⁶⁹ In guardianship proceedings, this original fiduciary relationship gives rise to roles for both the guardian and the "ward" quite different from those either party would have in a parental rights or dependency proceeding.

b. Does Minor Guardianship Recognize and Protect the Parent-Child Relationship?

When a parent selects and nominates the potential guardian for their child, guardianship law gives appropriate respect and deference to the parent's role in the child's life, at least in the initial phase of a guardianship proceeding. It permits a parent to make arrangements for their child if they need an additional or perhaps substitute caregiver. Such appointment can be made by the parent's petition or consent, without the need for any agency's or court's findings of unfitness. Indeed, although there is limited data, it appears that, in most guardianships, proceedings begin with a parent's consent or at least with a parent voluntarily placing the child in the care of the petitioner.³⁷⁰

The shortcomings of most minor guardianship laws in terms of recognizing and protecting the parent-child relationship are more apparent once an appointment of a guardian is made, whether with a parent's consent or based on a finding of a parent's unfitness. The laws are striking for their limited acknowledgment of the *existence* of the child's parents after the time of the initial appointment process.³⁷¹ In the vast majority of minor guardianships created today, one or both parents are alive with intact parental rights at the time the petition is filed; legal "orphans" are exceptionally rare.³⁷² A guardian is appointed when a parent is unwilling or unable to provide adequate care for the child at the time of the petition, but the child's long-term need for a guardian may not be identified or even considered. Guardianship laws' silence on the status of parents during the period of appointment, and the resulting ambiguity therefrom, sets the stage for possible conflict on two crucial and related issues. One is the parent's rights

³⁶⁹ See *supra* notes 40–52 and accompanying text. This view persists to this day in the UGCOPAA. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 209(a) ("A guardian for a minor is a fiduciary.").

³⁷⁰ See Gleeson et al., *supra* note 6, at 307–08 (describing research findings that one pathway to kinship care is a parent's request that the relative assume care of the child).

³⁷¹ Ann E. Ross, *Stability in Child-Parent Relations: Modifying Guardianship Law*, 33 STAN. L. REV. 905, 909–10 (1981).

³⁷² Julie M. Harcum, *Terminating Guardianships and Returning Children to Parents: Pitfalls and Possibilities*, 95 ILL. B. J. 542, 543 (2007) ("It is apparent from the gaps in the statute that when legislators passed it, they did not anticipate the high incidence of appointment of guardians for minors whose parents are still alive.").

and responsibilities with respect to the child during that period; the other is the termination of the guardianship when a parent seeks reunification.

Although a parent may still have some presence in a child's life during the period of a guardianship, most guardianship laws do not direct courts to include in orders any findings or provisions addressing whether and the extent to which a parent should have some retained rights such as for parent-child contact, authority to make decisions about a child's medical treatment and education, child support, and other components of parental rights and responsibilities commonly found in family law or child protection orders. Rather, the default is appointment of a "full" guardianship:³⁷³ that is, appointment as guardian provides a child's non-parent relative with nearly full control over the situation, not subject to the supervision of the state or a court, or to the consent of the parent.³⁷⁴ The parent's rights are thereby implicitly superseded by the powers provided to the guardian, and a parent may engage with their child only to the extent permitted by the guardian.

As noted in a prior section, courts have increasingly recognized and protected parents' fundamental rights to parent their children free from interference from third parties.³⁷⁵ Such rights were rarely implicated in traditional probate guardianships, as the parents were usually either dead or adjudicated incompetent, presumably permanently. The increasing use of guardianship for child protection, however, presents questions about the extent to which a parent's rights may be abridged in such appointments. As they stand, the guardianship statutes say little about such rights.

This blind spot is reflected in provisions that limit the powers of a guardian under a so-called "limited guardianship." Since a guardian is awarded the powers of a parent, to the extent any powers are limited, it would seem that those not awarded to the guardian are retained by the person who has such powers in the absence of the guardianship: the child's parent. However, many statutes are not framed this way. Rather, the standard provisions about limited guardianships direct courts to fashion the order in such a way as to help the minor develop "self-reliance," suggesting that the *child*, not the parent, would have the powers not awarded to the guardian.³⁷⁶ Such objective makes sense when placed in the adult guardianship context,³⁷⁷ but it is out of place in a minor guardianship. Developing

³⁷³ Minor guardianship is described by the Maine Supreme Judicial Court as a "blunt instrument." *In re Guardianship of Lantigua*, 133 A.3d 252, 257 (Me. 2016).

³⁷⁴ Belcher, *supra* note 222, at 25.

³⁷⁵ See *supra* notes 175–181 and accompanying text.

³⁷⁶ UNIF. PROBATE CODE § 5-206(b). The UGCOPAA retains the "developing self-reliance of the minor" objective but adds as a distinct interest to be considered by a court: "maintaining or encouraging involvement by a minor's parent in the minor's life." UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 206(c).

³⁷⁷ UNIF. PROBATE CODE § 5-311(b). The UGCOPAA does not use the term "self reliance" with respect to adults subject to guardianship and instead reflects an overall goal of including in orders appointing a guardian "provisions designed to ensure that the least restrictive means are used to protect

children's self-reliance is certainly a general societal and educational policy goal, but most family law statutes are aimed at ensuring that there is a suitable and responsible adult and, if necessary, the state to provide care, education, and shelter and to serve a child's "best interest."³⁷⁸

Because a guardianship was assumed, under traditional applications of the law, to be a permanent or at least indefinite arrangement, most statutes lack provisions aimed at maintaining, improving, or fostering the relationship between the child and their parents. In a guardianship appointment, no one is responsible for supporting reunification between the parent and child, and there is no equivalent to a family plan or other path to reunification. As discussed above (see III.A.), reunification is a key policy goal of federal child welfare laws and the structure and courts of dependency proceedings are designed to facilitate reunification and determine whether it is possible. Only after reunification efforts have failed may a state seek termination of parental rights. Guardianship laws do not reflect this policy goal and, because the state is not a party to the proceeding, a court has little if any authority to order reunification or other services to be provided to the family.³⁷⁹ The irony of this aspect of minor guardianship is that the family situations that, by and large, lead to its use for child protection are *less* serious than those resulting in formal state intervention. While family reunification is a more realistic goal in guardianship cases, parents are not provided the tools, support, or path to get there.³⁸⁰

The misfit between guardianship laws based on the orphan model and their use in a private child protection context is perhaps most dramatic with regard to a parent's ability to terminate a guardianship and regain their parental rights.³⁸¹ For a child in a *dependency* case, federal law sets a timeline for achieving "permanency": for better or for worse, the end is always in sight, even if the specific outcome is uncertain. There is also a hierarchy of possible results in such a case, with reunification being the top priority and the next being adoption. If the parent demonstrates their fitness

an individual alleged to need a guardianship or conservatorship." UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT, prefatory note 2.

³⁷⁸ While some aspects of the law have evolved to give minors more authority over their lives, these "rights" are not generally framed as having a basis in children's liberty interests. Rather, most state laws regarding children continue to be framed in terms of their "best interest," including their safety, stability, and the assurance of receiving adequate care, (much like so-called imbeciles and lunatics used to be) or avoiding harm. See generally GUGGENHEIM, *supra* note 101, at 35–41. Not all states include broad policy that grants rights to minor children to make decisions in their own lives; rather, such rights are limited to specific circumstances such as certain health care and reproductive rights decisions. *Id.* at 216–22, 245–50. A child may not be emancipated absent a court order or specific circumstances. JACOBS, *supra* note 54, at § 11:2 "Emancipation" ("Emancipation of a minor may be accomplished by judicial decree, statute or by circumstance as established by common law.").

³⁷⁹ Weisz & McCormick, *supra* note 18, at 209–10.

³⁸⁰ See Gleeson & Seryak, *supra* note 9, at 94–95 (concluding from research findings about parents who use informal kinship care arrangements for their child that such parents care deeply for their children, continue to provide some level of care, and should not be "written off").

³⁸¹ *Id.* at 214–15.

within the timeline, the court must order that the child be returned to their custody. This provision reflects the core recognition that, as long as it will not result in harm, children should be with their parents. This priority in dependency cases, is not the result of a straight “best interests” analysis. There is no assessment here of whether the parent’s home is the best, among a range of options, for the child; nor is there any consideration here of any bond that the child may have formed with the foster family. Rather, the parent-child relationship may be severed only if a parent has not and likely *cannot* timely address the problems that led to the child’s removal.

In *probate guardianships*, by contrast, the appointment is usually indefinite, and effectively permanent, for the minor’s entire childhood unless and until a party brings a petition to terminate. The orientation here is the opposite of that in a dependency case. In the orphan context, this approach made sense; the court could assume that the appointment would continue unless something happened to the *child* (adulthood, marriage, death) or to the *guardian* (resignation or death).³⁸²

As used for private child protection, however, guardianship presents courts with questions of how to assess a termination petition by a parent based solely on a change to the *parent’s* situation, and specifically in terms of their fitness and willingness to provide care for the child. Most guardianship laws are silent on these scenarios. In the best instances, the guardian and parent agree that the guardianship is no longer needed. While they could file a joint petition to terminate the order, it is likely that most families do not bother with this step. Instead, they may simply disregard the guardianship order as the parent resumes custody and care without any role for the court in the reunification. The guardian can stop using the appointment order for school enrollment or other actions that require legal authority. Alternatively, the guardian and parent may agree on some form of informal co-parenting, again without court supervision.

If, however, the parent and guardian cannot agree whether the appointment should terminate, the course of proceedings and outcome can be exceptionally difficult for all involved. With no path to reunification and little to no monitoring or supervision by the court after the appointment,³⁸³ neither the family nor the court is sufficiently equipped to assess a parent’s demand for the return of their child.³⁸⁴

As discussed above, in dependency cases federal law mandates that

³⁸² UNIF. PROBATE CODE § 5-210(a). The laws continue to permit termination of the guardian before one of these events, such as if a person with “an interest in the welfare of the minor” can petition to terminate the guardianship if they can prove that termination would be in the best interests of the child. UNIF. PROBATE CODE § 5-210(b); UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 211(b).

³⁸³ Weisz & McCormick, *supra* note 18, at 214–15.

³⁸⁴ Harcum, *supra* note 372, at 543 (noting absence in Illinois guardianship law of any “statutory standards . . . to allow for the termination of a guardianship when a parent becomes fit, willing, and able to care for his or her child.”).

parent-child reunification is a primary objective. States are required to implement reunification plans; they may cease reunification efforts and establish a permanency plan such as adoption or TPR only with a court's permission. In such cases, a parent's efforts to follow their part of the plan is often a central consideration in a court's determination whether to terminate parental rights. The absence of a similar approach in guardianship cases creates considerable problems in the context of a parent's petition for termination of guardianship, where a court may be faced with, on the one hand, a fit parent and, on the other, a child in safe, stable living environment with a guardian. Without a family plan in place and no allocation of rights and responsibilities, the court has limited evidence to consider.

In the context of guardianships for child protection, guardians who oppose the termination of their appointments frequently base their arguments on a "best interests" approach, emphasizing the safety and stability they have provided to the child and the bond that has formed through the caregiving and alleging that the child will be harmed if returned to their parent's care.³⁸⁵ However, a parent's contested petition to terminate a guardianship implicates the constitutional principles outlined in the Supreme Court's opinion in *Troxel v. Granville*: a parent, unless found to be unfit, is presumed to be making decisions in their child's best interest.³⁸⁶

The story presented with a contested petition to terminate is often as follows: (1) the parent at one time could not care for the child; (2) a guardian was appointed—with or without the consent of the parent—and now the child and guardian are doing well; (3) the parent claims to have addressed the difficulty leading to the guardianship and now wishes to resume their role as primary caregiver. If the parent petitions to terminate the guardianship on the basis that they are fit, and the guardian disputes that claim, the question is how, in light of the *Troxel* presumption, does the court allocate the burdens?

The UPC is silent on the allocation of burdens, but some guardianship statutes place the burden of proof that the guardianship is no longer needed on a person petitioning to terminate a guardianship.³⁸⁷ In some instances, such allocation of burden makes sense. However, if the petitioning person is the *parent*, the continuation of a guardianship over a fit parent's objection would be in direct contravention of the *Troxel* presumption. Moreover, proving that termination of the guardianship is in the child's "best interest" is a difficult burden for most parents to meet, particularly where a

³⁸⁵ See, e.g., *In re Guardianship of D.J.*, 682 N.W.2d 238, 245–48 (Neb. 2004); *In re D.I.S.*, 249 P.3d 775, 778–79 (Colo. 2011); *In re Guardianship of Zacharia Stevens*, 86 A.3d 1197, 1199–200 (Me. 2014).

³⁸⁶ *Troxel v. Granville*, 530 U.S. 57 (2000); see *supra* notes 175–181 and accompanying text.

³⁸⁷ See UNIF. PROBATE CODE § 5-210 (1982); W. VA. CODE § 44-10-3(j) (2013); ME. REV. STAT. ANN. tit. 18-A, § 5-212(d) (2018) (to be replaced by new law on 7/1/19; 18-C, § 5-210(6)); N.H. REV. STAT. ANN. § 463:15 (2019).

guardianship has been in place for a long time.³⁸⁸ Indeed, as noted earlier (see Part II.C), one of the reasons a relative caregiver may seek guardianship rather than continue with informal kinship care is to protect the arrangement from the specter of the “returning parent.”³⁸⁹

Courts have not answered the burden-allocation question consistently.³⁹⁰ As others have examined the difficult issues that arise in these cases, I will note the competing views here only briefly.³⁹¹ Most courts decide whether to apply the *Troxel* presumption on whether the guardian was appointed with the consent of the parent or based on a prior court finding of unfitness. For example, in *In re Guardianship of Reena D.*, the New Hampshire Supreme Court, following the majority line in such cases, held that, if the parent consented to the initial appointment, they remain presumptively fit and therefore, in seeking to resume custody, they are entitled to the *Troxel* presumption that they are acting in their children’s best interests.³⁹² The court reasoned that the majority approach “not only satisfies constitutional concerns, but serves important policy interests.”³⁹³ Regarding the applicable burden of proof, it concluded: “The guardian bears the burden of proof in a proceeding to terminate the guardianship because the fit parent’s decision to terminate the guardianship must be accorded ‘special weight,’ and is presumed to be in the child’s best interests.”³⁹⁴ In such an approach, a “best

³⁸⁸ Weisz & McCormick, *supra* note 18, at 214–15.

³⁸⁹ See *supra* notes 166–167 and accompanying text.

³⁹⁰ Compare *Hartleib v. Simes*, 776 N.W.2d 217, 224 (N.D. 2009) (holding that a non-parent seeking to retain custody must demonstrate that “exceptional circumstances” exist to overcome rebuttable presumption that custody should return to the parent and prove by a preponderance of the evidence that it is in the child’s best interest for the guardianship to continue), with *Tourison v. Pepper*, 51 A.3d 470, 473–74 (Del. 2012); *Boddie v. Daniels*, 702 S.E.2d 172, 175 (Ga. 2010) (guardian must prove that child will suffer physical or emotional harm if custody awarded to parent and that continuation of guardianship will promote the child’s “welfare and happiness.”).

³⁹¹ See *Gupta-Kagan, Non-Exclusive Adoption*, *supra* note 337, at 723; Leslie Barry, *What Happened to Cassandra H.: The Unsuspecting Impact on Parents*, 2 WHITTIER J. CHILD & FAM. ADVOC. 19, 28–36 (2003); *Harcum*, *supra* note 372, at 555.

³⁹² *In re Guardianship of Reena D.*, 35 A.3d 509 (N.H. 2011). The court also noted that the majority of courts to consider the question of whether parents who had consented to a guardianship were entitled to the “*Troxel* presumption” that “fit parents act in the best interests of their children” concluded that such presumption does apply. *Id.* at 512–13 (“These courts reason that a parent of a child in a guardianship established by consent is presumptively fit and, thus, the parent’s decision to terminate the guardianship is entitled to due regard.”) (citing cases).

³⁹³ The court quoted extensively from the analysis of one of that line of cases, the Colorado Supreme Court’s opinion in *In re D.I.S.*:

An important characteristic of a guardianship by parental consent is that parents have exercised their fundamental right to place their child in the custody of another . . . [to] further [] the child’s best interests. Failure to accord fit parents a presumption in favor of their decision to terminate a guardianship established by parental consent would penalize their initial decision to establish the guardianship and deter parents from invoking the guardianship laws as a means to care for the child while they address significant problems that could impair the parent-child relationship or the child’s development.

Reena D., 35 A.3d. at 513–14 (quoting *In re D.I.S.*, 249 P.3d 775, 783 (Colo. 2011)).

³⁹⁴ *Id.* at 114 (quoting *Troxel*). Specifically, the guardian must demonstrate that “‘substitution or supplementation of parental care and supervision’ is ‘necessary to provide for the essential physical and

interests” determination is considered to be both separate from and secondary to the question of parental fitness.³⁹⁵

As guardians are usually appointed with the consent of one or both parents, most of the case law has developed in the context of such cases, with the majority giving the *Troxel* presumption to the parents, as in *Reena D.* Courts following a minority approach interpret *Troxel* narrowly to conclude that a parent “who voluntarily relinquishes the care, custody and control of his child by consenting to a guardianship also relinquishes his entitlement to the *Troxel* presumption.”³⁹⁶ A few courts have considered the implications of *Troxel* in termination petitions when the original appointment was based on a finding of parental unfitness rather than consent; and there is even less consensus in courts’ approaches in that context.³⁹⁷

The unsettled law regarding burdens and standards for termination of guardianship reflects a clash of models for what kind of judicial intervention is appropriate to address a parent’s period of inability to parent. Courts are seemingly faced with stark choices because the orphan model is reflected in most guardianship laws.³⁹⁸ While the court-fashioned presumption-of-fitness approach is constitutionally sound, it does not sit well with many trial judges faced with the prospect of removing a child from the custody of a long-term caregiver.³⁹⁹ Given a range of situations, a court can try to fashion

safety needs of the minor’ and that terminating the guardianship will ‘adversely affect the minor’s psychological well-being.’” *Id.* The court further concluded that *Troxel* requires courts to apply a clear and convincing standard to such burden of proof. *Id.*

³⁹⁵ See, e.g., *In re SRB-M*, 201 P.3d 1115, 1120 (Wyo. 2009) (vacating order denying parent’s petition to terminate based on best interest determination when there was no finding of unfitness); *In re D.I.S.*, 249 P.3d at 782–86.

³⁹⁶ *Reena D.*, 35 A.3d. at 513 (citing *In re Guardianship of L.V.*, 38 Cal. Rptr. 3d 894, 896, 902 (Cal. Ct. App. 2006); the other minority case cited in *Reena* was decided only a few months after *Troxel* and makes no reference to the opinion). The court concluded that the majority approach “best comports with *Troxel* and its New Hampshire progeny” that “parents who have not been adjudicated unfit in an abuse/neglect or termination of parental rights proceeding are presumptively fit.” *Id.*; see also *Matter of Guardianship of W.L.*, 467 S.W.3d 129, 133 (Ark. 2015) (holding that a “guardianship is no longer necessary once a fit parent revokes an earlier-given consent. . . . because a fit parent is presumed to be acting in the child’s best interest.”).

³⁹⁷ *In re Guardianship of Raven G.*, 66 A.3d 1245, 1248–49 (N.H. 2013) (parent previously adjudicated as unfit not entitled to *Troxel* presumption and must prove by a preponderance of the evidence that the guardianship is no longer needed and that termination will not adversely affect child’s psychological well-being); *In re Guardianship of David C.*, 10 A.3d 684, 686 (Me. 2010) (indicating that *Troxel* presumption may apply to all guardianship terminations but guardian may demonstrate unfitness by preponderance standards). See also 14 VT. STAT. ANN. § 2632(b)(2), (c) (2014) (termination standards based on whether guardianship appointment was consensual.).

³⁹⁸ Harcum, *supra* note 372, at 555 (“The apparent gaps in the guardianship statute [regarding termination] create real difficulties for children who have guardians, as well as for guardians themselves, and even for biological parents who wish to regain custody of their child.”).

³⁹⁹ *Id.* (noting that because “parents’ rights are superior” to a child’s best interests, a guardianship termination petition brought by a fit parent could “could serve to threaten the permanency and continuity for a child.”).

an eleventh-hour “reunification” plan of sorts with hope that it will work,⁴⁰⁰ or it can maintain the custodial arrangement by granting the guardian status as a parent, or it can grant the guardian some form of third-party contact rights.⁴⁰¹

It is far better for all concerned, but also far less common, for the court and parties to a guardianship case to take a reunification-oriented approach from the outset, as is done in dependency cases. Based on fact-finding in a contested matter or inquiry of the parties to an agreement, the court could identify the family’s specific problems and needs and create a series of benchmarks with a timeline, if feasible. Such an orientation provides a potential path to ending the case; and, if the parent veers off the reunification path, then the court has more evidence and perhaps clearer options to work with, rather than only presumptions and predictions. In other words, the key to a sound approach to guardianship termination is a sound beginning at the time of the appointment. Unfortunately, few guardianships laws direct courts to follow this route. As a result, a parent who initially consented to appointment of a guardian as a way to keep the matter within the family and out of child welfare system may find that they cannot regain custody of their child.⁴⁰²

c. Does Minor Guardianship Value the Role of Extended Family?

The very existence of minor guardianships—since its earliest origins—reflects a recognition of the value of extended family to address a child’s needs; and, in a contemporary guardianship proceeding, a child will likely end up in the home of a close relative. Through nomination for a “stand-by” guardianship or other form of consented-to guardianship, parents have an opportunity to select a relative to care for their child, with no worry about the relative’s ability to meet licensing standards or other requirements that may be imposed by a public agency. The proceeding generally involves only family members and is less complex, protracted, and formal than a dependency case.

However, that caregiver may not be in the best position to meet a child’s needs. As noted earlier, on the whole, kinship care providers are elderly, poor, and generally unprepared for having a child unexpectedly put in their care.⁴⁰³ There are limited supports and financial assistance for relative caregivers outside of the public child welfare system, which can place a strain on the household. Minor guardianship laws can also undermine the goal of protecting the role of extended family when the lack of guidance for

⁴⁰⁰ Harcum, *supra* note 372, at 555 (noting that while GALs can investigate and recommend a specific transition services, there is “no mechanism or agency of the court set up to provide these services, at least in the probate context”).

⁴⁰¹ *See, e.g. In re K.H.*, 773 S.E.2d 20, 31 (W. Va. 2015); Gupta-Kagan, *supra* note 166, at 75–81.

⁴⁰² *See* Barry, *supra* note 391, at 40.

⁴⁰³ *See supra* notes 306 **Error! Bookmark not defined.** and accompanying text.

termination of the guardianship leads to intrafamilial conflict and litigation.⁴⁰⁴

3. Using Probate Courts for Child Protection

The location of minor guardianship in probate codes has important implications for which *courts* have jurisdiction over these cases. While some states have established Unified Family Courts with comprehensive jurisdiction and ancillary services for a range of family related matters, including minor guardianship,⁴⁰⁵ in other states, minor guardianships are handled primarily or exclusively in probate courts. Because the primary focus of probate courts is estate and property matters—rather than family and juvenile law—such courts have not generally been the sources of key innovations and developments in disputes involving the care and custody of children, including refining and implementing constitutional principles and problem-solving approaches.

Most probate courts do not have child-focused caseloads, expertise in the non-legal concerns associated with child protection, or the other features found in most courts adjudicating dependency proceedings discussed earlier (Part III.A.2).⁴⁰⁶ As a result, the court may be ill-equipped to meet a child's needs when their family is in crisis or conflict or recognize the central role of preserving parent-child relationship and protecting parents' liberty interests,⁴⁰⁷ and the handling of minor guardianship cases can fall short of meeting the policy goals of child protection and preservation of family ties.

As a pair of commentators noted with respect to California probate and dependency courts: “Despite adjudicating identical interests—the custodial needs of abused, neglected and abandoned children—the two courts play by vastly different rules.”⁴⁰⁸ Maintaining minor guardianship cases in probate courts can also mean that there is fragmented jurisdiction over cases

⁴⁰⁴ See *supra* notes 381–402 and accompanying text.

⁴⁰⁵ See, e.g., Md. R. 16-204; Barbara Babb, *Maryland's Family Divisions: Sensible Justice for Families and Children*, 72 MD. L. REV. 1124, 1127 (2013).

⁴⁰⁶ See *supra* notes 286–295 and accompanying text. Some state probate courts, however, have undergone significant reform to reflect their new role in addressing the needs of children and families. See Duques, *supra* note 6, at 94–95 (describing development of regional probate courts in Connecticut devoted to hearing “children’s matters”).

⁴⁰⁷ CFS FINAL REPORT, *supra* note 196, at 2–3, 48–51. For example, important features to address these cases, such as guardians ad litem, social services, court-appointed counsel, and other features that are seen increasingly in family courts today are frequently lacking in probate courts. Smith, *supra* note 23, at 78–80, 86–90; Weisz & McCormick, *supra* note 18, at 204–205. Hardin observes that one of the long-standing distinctions between probate and juvenile/family court guardianships is that “only the latter involved ongoing cooperation between the court and social workers, probation officers, psychologists, and other allied professionals.” Hardin, *supra* note 46, at 158. See also Hardin, *supra* note 46, at 164–174 (arguing that judges overseeing child welfare cases must have a high degree of specialized expertise, training, and knowledge of resources, and they must oversee the cases using a child-focused scheduling system).

⁴⁰⁸ Weisz & McCormick, *supra* note 18, at 196.

involving the care and custody of children.⁴⁰⁹ Such cases present an entirely separate and additional set of problems when the child is the subject of proceedings in multiple courts at once.⁴¹⁰

While probate courts are often valued for being relatively informal,⁴¹¹ the process of seeking appointment as a guardian may still be daunting for a relative caregiver, especially one who lacks the resources to retain counsel. As I have learned from many probate judges and clerks and observed in cases handled by our law school clinic, grandparents and other relative caregivers often struggle with the paperwork and other filing requirements to initial a guardianship proceeding.⁴¹² As the petitioner, the caregiver is responsible for initiating and prosecuting the action. This can involve complex paperwork and meeting other filing, service, notice, and appointment requirements.⁴¹³ Legal aid programs and so-called “kinship navigators” may provide some level of assistance, but by and large, relative caregivers must pursue this legal status on their own.⁴¹⁴ It is likely that some children end up in foster care only because the potential caregiver does not have the resources to pursue guardianship.

Many of the limitations of using probate law and courts to address child protection outlined above were raised more than 50 years ago when minor guardianship was first explored as a tool for child welfare cases.⁴¹⁵ While a few states have followed some of these recommendations, in most others this form of what is clearly “family law” remains wholly outside the jurisdiction of the courts who oversee all other family law matters.⁴¹⁶

⁴⁰⁹ As an example of both the fragmentation and the trade-off for families, Connecticut probate courts judges transfer guardianship matters to juvenile courts, where they become dependency proceedings, when there is a need for services for the family. CFS FINAL REPORT, *supra* note 196, at 17.

⁴¹⁰ Ross, *supra* note 371, at 910 n.19 (In addition to the problems of conflicting standards, guardianship statutes often create a conflict in jurisdiction over child custody matters). Most recently, Vermont and Maine have taken steps to address the problem of split jurisdiction by enacting laws that allow minor guardianship matters to proceed in courts other than probate courts. Me. P.L. 2016, ch. 460 (enacting ME. REV. STAT ANN. tit. 4, § 152(5-A) (2016)); Vt. 2013, Adj. Sess. No. 170 (enacting VT. STAT. ANN. tit. 14, § 2624 (2014)).

⁴¹¹ CFS FINAL REPORT, *supra* note 196, at 2; Duques, *supra* note 6, at 93–94.

⁴¹² There is a dearth of data on this evidently unmet need.

⁴¹³ Some commentators have raised the question of whether relative caregivers “have, on average, the legal, bureaucratic, and literacy skills to manage the application process.” Berrick & Hernandez, *supra* note 7, at 31.

⁴¹⁴ Berrick & Hernandez, *supra* note 7, at 26.

⁴¹⁵ One of the first scholars to propose that states develop a regulated system of judicially-appointed guardians for children in need of care by others was social work scholar Irving Weissman. Probate courts, he found, lacked adequate administrative staff, “dignified” courtrooms, social services, and judges with the appropriate backgrounds and knowledge to oversee child welfare cases. Guardianship proceedings, he concluded, should not be in probate courts but in juvenile courts or other courts of general jurisdiction regarding the welfare of children. WEISSMAN, *supra* note 197, at 168–79. *See also* Testa & Miller, *supra* note 136, at 406–407; Hyatt, *supra* note 197, at 13–19.

⁴¹⁶ *See* Hon. Robert M.A. Nadeau, *Maine’s Probate Courts: The Other Family Law*, 18 ME. B.J. 32, 34 (2003) (probate judge describing how “Maine’s probate courts have become family law courts. Any Maine judge of probate today will tell you, if asked, that his or her time on the bench is primarily consumed by custody and related family issues.”).

IV. REFORMING MINOR GUARDIANSHIP TO BETTER SERVE CHILDREN AND FAMILIES IN CRISIS

As we have seen, the present important role of minor guardianship in addressing a family's need for a legal custodian when neither parent is able to serve as a child's primary caregiver is the result of a complex set of developments rather than intentional design. There are now two legal routes—one public and one private—to secure authority for a non-parent to care for a child in need of protection. The problems that lead families to take either of these routes are the same: a parent's poverty, substance use, homelessness, incarceration, or an untreated or chronic illness. A determining factor for whether the family ends up on the public or private track appears to be if there is a relative—perhaps one identified by the parent or a public agency—who has the knowledge, desire, resources, and ability to seek the role of alternative custodian prior to any formal state intervention.⁴¹⁷ There are significant implications for the family if a relative caregiver pursues appointment as a guardian: in remaining outside of the public child welfare system, the family is subject to a statutory scheme that, in most states, was not designed to operate in a child protection context.

The appointment of a guardian for a minor can forever transform a family, including the adults' ties with each other and their legal relationship with the child. In many families, the guardian is not seeking to become the permanent substitute parent for the child and may hope the parent will resume their role, perhaps solely or in tandem with the guardian. In other cases, the guardian may want to perpetuate the guardianship indefinitely and assumes that the appointment will assign them long-term parental rights. In either context, a guardianship appointment confers neither the expectation nor the tools for facilitating reunification between the child and parent. And this is the critical difference between public and private child protection.

To ensure that the core child protection policy goals developed by the nation's courts and legislatures are met in such cases, states must reform their minor guardianship laws and procedures to reflect their contemporary use.⁴¹⁸ Accordingly, I outline in this Part some broad considerations for

⁴¹⁷ CFS FINAL REPORT, *supra* note 196, at 20 (noting that “there is little difference between some of the children in Probate Court and the children in Juvenile Court, just that Probate Court ones are lucky to have family.”).

⁴¹⁸ Children's advocates have criticized the current dual track system as “depriv[ing] children of equal justice under the law and contraven[ing] the central goal of protecting the ‘best interest of the child.’” Weisz & McCormick, *supra* note 18, at 191. Some refer to private kinship care as “watered down” foster care or a “separate, unequal, and unnecessary system for at risk families.” AECF, *supra* note 158, at 13. A pair of scholars noted the “illogical and inconsistent” distinctions among the various categories of relative caregiving for purposes of public support and services. Berrick & Hernandez, *supra* note 7, at 30. They attribute these distinctions to varying “philosophies” and an “incremental approach” to policymaking. *Id.* Child welfare scholars have advocated for the development of better “private law alternatives” to the child welfare system. See Gupta-Kagan, *supra* note 166, at 62. One person interviewed for the AECF study on kinship diversion observed: “Loss of control is a high price to pay” for getting the supports and services the family needs. AECF, *supra* note 158, at 2. The implications for

reform to minor guardianship laws and procedures. The reforms described below are geared to the overarching policy goal of protecting children from harm while valuing and preserving kinship ties to the greatest extent possible. Minimizing the inequities for families on the private track requires more than providing the additional supports and services that some commentators have advocated: effective reform must address the entire orientation of minor guardianship laws and procedures.

The foundation for such reform should be the recognition that minor guardianship is a tool for child protection and a part of a broader child welfare system. Two components are, therefore, crucial. First, minor guardianship must be unanchored from its probate, orphan, and property origins and de-linked from adult guardianship. Ideally, to ensure that the laws and practices no longer reflect the orphan model, the laws should be wholly removed from the probate context in terms of both codes and courts. Specifically, to reflect their use addressing the needs of families in crisis, the laws should be located in a state's family law code, not the probate code; and the cases should be heard not in courts that have primarily probate jurisdiction but rather in specialized family courts, preferably unified family courts.⁴¹⁹

Second, policymakers should revise minor guardianship provisions to address the policy goals of family law—and in particular child protection law. Minor guardianship law must be re-oriented to protect not property but kinship ties. It should do this by preserving the parent-child relationship wherever possible and by putting a high priority on extended family relationships. Applying these two components of reform means that changes to guardianship statutes should be shaped by considerations of how the start, the middle, and the end of the guardianship can each best serve the central goal of preserving familial ties.

the extent of services and support for children in and out of the public child welfare system “remains an area of controversy and complexity” because of the consequences for the families and system alike. Goodman et al., *supra* note 7, at 290.

⁴¹⁹ Other scholars have explored in detail the features and benefits of the Unified Family Court model, which refers to a “specialized and separately administered court with jurisdiction over a wide range of family related cases.” Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147, 148 (1998); see generally Barbara A. Babb, *Family Courts are Here to Stay, So Let's Improve Them*, 52 FAM. CT. REV. 642 (2014); Catherine Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3 (1998); Weisz & McCormick, *supra* note 18, at 217–19. The complex nature of minor guardianships—with the difficulty, issues, emotions, and intrafamily dynamics—make the case for UFCs well. In addition, if the family court also has jurisdiction over a wide range of matters, the court is in a better position to consider whether a different kind of proceeding would be more appropriate for the situation, such as whether a child protection matter could be addressed through a parental rights or guardianship order or vice versa. Hardin, *supra*, at 182–83. See, e.g., *In re Custody of Lori*, 827 N.E.2d 716 (Mass. 2005) (“If the court, in the course of a guardianship proceeding determines either sua sponte or at the request of a party that the child should be placed in the custody of the Department of Children and Families on an emergency basis, the parent, guardian, or custodian being deprived of custody is entitled to the same evidentiary hearing, within seventy-two hours, as would be available to a parent in a care and protection action in the Juvenile Court Department” under the dependency law.”).

Fortunately, there is already some progress being made in this area. Some states have made revisions or major overhauls to their minor guardianship laws to reflect these policy goals and unlink the laws from their probate and property origins. For example, based on a task force report and implementing a private child protection model, Vermont created ground-up new minor guardianship statute in 2014.⁴²⁰

Minor guardianship laws can be effectively reformed even if they remain within a probate code. Maine, a UPC state, recently studied and made substantial revisions to its minor guardianship law.⁴²¹ In addition, in 2017 the Uniform Law Commission approved the UGCOPAA, reflecting the ULC's recognition, for the first time, of the predominant contemporary use of minor guardianships for child protection. The UGCOPAA itself is an important step toward a broad recognition of minor guardianship law as properly part of the overall development of child protection and child welfare laws, as well as a broader transformation of the role of courts in adjudicating questions of children's interests, including the question of who is responsible for their care. If modest reforms such as these are to be effective, policymakers must recognize minor guardianship as an essential component of family and juvenile law and let go of the goal of maintaining parallel provisions between the adult and minor forms of guardianship.

An appropriate model exists for all minor guardianship, namely the subsidized kinship/permanency guardianships developed through public child protection laws, particularly as originally envisioned by Bogart Leashore and described earlier.⁴²² These appointments were developed specifically to address a child's needs in the child protection context, and they provide many advantages over traditional probate-oriented guardianships. Most notably, these appointments can provide safety and stability for the child while preserving the parent-child relationship and the child's relationship with a relative caregiver.⁴²³ Specifically, such an appointment provides the relative caregiver legal authority regarding the child—shifting that authority from the state to the family through the appointment—while enabling the child to maintain their identity and relationship with one or both parents. Under this model, the guardianship can be modified and even terminated if circumstances warrant it. It also provides subsidies for the relative caregiver, which can be the support needed to help the household remain stable and thrive.

As it stands, subsidized kinship/permanency guardianship remains an

⁴²⁰ Vt. 2013, Adj. Sess., No. 170 (enacting VT. STAT. ANN. tit. 14, §§ 2621–2634 (2018)).

⁴²¹ The Maine Legislature used the 2010 UPC as the starting point. P.L. 2017, ch. 402 § A-2 (enacting ME. REV. STAT. ANN. tit. 18-C, §§ 5-201–5-212 (2019)). Massachusetts is another state that has made some reforms to its UPC based minor guardianship law. Sheriece M. Perry, *Guardianship of Minors Under the Mass Uniform Probate Code*, GCP MA-CLE 8-1 (2015).

⁴²² See *supra* notes 203–218 and accompanying text.

⁴²³ Gupta-Kagan, *supra* note 337, at 733–34.

underused option. Most states reserve its use for older children and in other contexts where adoption appears unlikely, in part out of concern that, as compared with an adoption, it is not sufficiently “permanent.”⁴²⁴ However, research has documented the significant benefits of this approach in meeting family policy goals, including stability,⁴²⁵ and it should be employed far more often in both the public and private child protection realms.⁴²⁶ Also, to reduce inequities, policymakers should extend subsidies and services to families that arrive at a guardianship arrangement without the initial intervention of a public CPS.⁴²⁷

As part of a broader reform initiative, states should evaluate whether there are revisions needed to *other* statutes to decrease a relative caregiver’s need to seek appointment as guardian. As noted earlier, in many instances relative caregivers seek such orders primarily to access health care, public benefits, and school enrollment. In many of these situations, however, a less extreme legal remedy could serve such needs and be a better option for the family otherwise. For example, school residency and enrollment laws could give authority to school districts to permit students to enroll when they are temporarily in the home of a relative caregiver, particularly with the consent of a parent.⁴²⁸ Similarly, health care access or caregiver consent laws could authorize relative caregivers to serve as surrogate decisionmakers in some contexts.⁴²⁹ Such laws have their own limitations⁴³⁰ but may be sufficient in many contexts.⁴³¹ A power of attorney or delegation of parental rights might

⁴²⁴ Testa & Miller, *supra* note 136, at 416–17.

⁴²⁵ Testa, *supra* note 237, at 521–34.

⁴²⁶ Clare Huntington has argued:

By providing financial support for permanent care by family members, the state is less overtly involved in the lives of the family, increasing stability and permanency in children’s lives, and leaves the door open to contact between biological parents and children. This makes it more likely that a child can have strong, stable, positive relationships with both parents and family guardians.

HUNTINGTON, *supra* note 15, at 129.

⁴²⁷ The Family First Prevention Services Act (P.L. 115-123), enacted by Congress on February 9, 2018, provides expanded opportunities for states to support kinship families. See *The Family First Prevention Act: Historic Reforms to the Child Welfare System Will Improve Outcomes for Vulnerable Children*, CHILDREN’S DEFENSE FUND (Feb. 2018), <https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf>.

⁴²⁸ See, e.g., ME. REV. STAT., tit. 20-A, § 5205(2) (2017) (permitting schools to enroll a child “residing with another person who is not the student’s parent” if it would be in the child’s best interest); COLO. REV. STAT. § 22-1-102 (2019) (providing several bases on which a school may enroll a child who is not living with a parent). Some children living with relatives may be classified as “homeless” and eligible to enroll in the district where they live pursuant to the McKinney-Vento Homeless Assistance Act of 1987 (Pub. L. 100-77, July 22, 1987, 101 Stat. 482, enacting 42 U.S.C. § 11301 et seq.).

⁴²⁹ See, e.g., ME. REV. STAT., tit. 22, § 1503-A (2016).

⁴³⁰ John W. Ellis, *Yours, Mine, Ours? Why the Texas Legislature Should Simplify Caretaker Consent Capabilities for Minor Children and the Implications of the Addition of Chapter 34 to The Texas Family Code*, 42 TEX. TECH. L. REV. 987, 1000–19 (2010) (discussing various approaches to state caregiver consent laws and the problems and implications of the same).

⁴³¹ For example, not all education and health care providers will accept written consent as sufficient authority to provide services. HARALAMBIE, *supra* note 11, at § 11:5; GENERATIONS UNITED, *State Educations and Health Care Consent Laws*, AM. BAR ASSOC. (Jan. 9, 2018),

provide the necessary authority in some contexts and would ensure that a parent's decision-making rights and role are protected and preserved.⁴³² Because guardianship can result in conflict between the most important people in a child's world, a guardianship appointment should be made only if it is found to be truly necessary and when no less restrictive means can be used to address the child's needs.⁴³³

In addition to providing parents and caregivers with a range of options, states should provide the resources to enable families to learn, assess, and implement these options. Many families that could benefit from a guardianship appointment or other strategies do not pursue them because they lack the knowledge and tools to do so. Ideally, civil legal aid services should be available to inform and advise parents and relative caregivers. In addition, kinship navigators (who are not usually attorneys) should be provided to inform relative caregivers about their options and how to access services. These navigators are available in a handful of states now with the support of federal funding.⁴³⁴ In some guardianship cases, a relative caregiver and parent may not need to work with attorneys, especially if the appointment is consensual and the court provides a mediator or other neutral party to assist the family with developing the guardianship plan. But because these matters can be or become more complicated, the parties should have access to counsel, including free legal aid.

I now turn to the specific features that states' minor guardianship laws should include to reflect and to serve their contemporary use for child protection. Present guardianship laws and procedure overlook the importance of how the appointment is made, which can provide an opportunity to set the entire proceeding on a track to stability and effective reunification.

Guardianship laws should require courts to assess the suitability of the petitioner before the appointment is made. In some states, a guardian must already be a caregiver for the child or be a close relative or otherwise have a close relationship with the child.⁴³⁵ Permanency guardianship laws include

https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/june-2014/state-educational-and-health-care-consent-laws/; See e.g., W. VA. CODE § 49-11-1 to 49-11-10 (2010).

⁴³² UNIF. PROBATE CODE § 5-105. The ULC made this an optional provision in the UGCOPAA, because it was not a guardianship; UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROT. ARRANGEMENTS ACT § 128, note (“[T]he subject matter of this section is more appropriately included in a state’s general family law statutes”).

⁴³³ In addition, as other commentators have urged, states should provide services and supports to the family that may *prevent* the crisis from reaching the point where the child cannot live safely with a parent. This means access to health care, including mental health and substance use treatment, as well as basic economic and housing security. See *supra* note 276 and accompanying text.

⁴³⁴ Berrick & Hernandez, *supra* note 7, at 31 (advocating for expanded availability of kinship navigators to improve families’ ability to pursue minor guardianship). For example, the Maine Kinship Advisory Group released a January 2018 report to the Maine Legislature describing the needs of kinship families in the “informal” kinship system for information and resources. (Report on file with author).

⁴³⁵ See *supra* note 73.

similar requirements and can serve as models here.⁴³⁶ In addition to requiring guardians to have a specific prior connection with the child, guardianship laws should reflect the role that most guardians play today and include language regarding assessment of their suitability for these duties.⁴³⁷

Where a parent is consenting to the guardianship, and thereby waiving their constitutional rights, the court should ensure that such consent is fully informed.⁴³⁸ Specifically, parents should understand the implications of the guardianship for their parental rights, the process for terminating the guardianship, including the fact that they cannot simply revoke their consent and resume their role as parent.⁴³⁹ This understanding can be reflected in a court form outlining information about the guardianship that is signed by the consenting parent with the assistance of counsel.⁴⁴⁰ Guardians too must be informed of their responsibilities, what the guardianship does and does not mean, and how it may end.

Whether or not the appointment is made with the consent of the parent, the statute should require the court to adopt a guardianship plan as a court order. If possible, the plan should be devised with the engagement of the guardian and parent, perhaps assisted by a guardian *ad litem*, child's attorney, or visitor. At a minimum, the court should make mediation resources available to the family to work through the terms of a plan, which can be presented to the court for review, modification, and approval. Court forms can also be used to ensure that the guardianship plan addresses all necessary components. While these tools—mediators, attorneys, guardians *ad litem*, visitors etc.—involve cost, the expenditure serves as protection against future costs. Participation in mediation and, as necessary, receiving counseling can better enable the family members to identify solutions, as

⁴³⁶ Katz, *supra* note 202, at 1096–97. Katz notes that, because the Adoption and Safe Families Act does not define “kinship,” states have developed their own definitions of “relative.” Some are quite broad, including, “not only people related by blood, marriage, or adoption, but also people who have a significant relationship with a child often referred to as ‘fictive kin,’ while others are narrow. *Id.* Compare, e.g., ALA. CODE § 38-12-2 (2017) (defining “relative” as an individual who is legally related to the child by blood, marriage, or adoption within the fourth degree of kinship”), with MD. CODE REGS. § 07.02.29.02 (2019) (defining “relative” to include any adult “related by blood, marriage, or adoption within the fifth degree of consanguinity or affinity” or “who makes up the family support system, including adults related beyond the fifth degree of consanguinity or affinity, godparents, friends of the family, or other adults who have a strong familial bond with the child.”).

⁴³⁷ Maine recently added a definition to its minor guardianship law to require a court finding that the petitioner would be “suitable” to serve as a guardian, which is defined as: “guardian can provide a safe and appropriate residence for the minor, understands and is prepared to follow the terms of the appointment and understands and can address the minor’s needs and protect the minor from harm.” ME. REV. STAT. tit. 18-C, § 5-102(31) (2019).

⁴³⁸ See, e.g., ME. REV. STAT. tit. 18-C, § 5-205(6) (2019); VT. STAT. ANN. tit. 14, § 2626(a) (2014).

⁴³⁹ This is a critical different between a guardianship and a delegation of parental rights, the latter of which may be revoked at any time. See, e.g., MASS. GEN. LAWS ch. 190B, § 5-103(d) (2009) (“Any delegation under this section may be revoked or amended by the appointing parent(s) or guardian(s) and delivered to all interested persons.”).

⁴⁴⁰ In comparable situations where a person is waiving a fundamental right, they receive access to a lawyer, court-appointed if necessary, such as when entering a guilty plea or consenting to state custody of their child.

they are in the best position to assess what might be helpful to address the parenting gap. The more the parties enter into the arrangement with knowledge, input, and buy-in, the less likely there will be conflict and litigation—both of which are costly on several levels—down the road.

The scope of the appointment order and guardianship plan—whether developed by agreement or after a hearing—should be limited and tailored to the family’s specific needs, rather than being a “blunt instrument,” as one state court describes the “full” guardianship order seen in most cases.⁴⁴¹ Guardianship laws need to include specific provisions authorizing courts to enter child-focused limited and tailored orders so that there is no question about whether the court is acting within its jurisdiction.⁴⁴² A conflict-free, successful, and appropriate guardianship termination has its roots at the beginning of the guardianship, through a reunification plan and perhaps a set of benchmarks that reflect the specific situation and provide clear expectations to all. As remarked by child protection scholar Martin Guggenheim: “The key to a successful [parent-child] reunion is nurturing the relationship between parent and child during the period they are apart.”⁴⁴³

During the period of the guardianship, any level of continued engagement with a child by a parent is a potential route to their reunification. Parental engagement can also minimize the stigma of the guardianship for all concerned. In certain cases, it may even make sense to appoint the parent as a co-guardian, and the court should have the clear authority to do so.⁴⁴⁴ The prospect of a tailored order may also increase the likelihood that the orders are entered by consent, which will minimize conflict and allow the parties to devise a plan that best suits the situation rather than leaving it to a court to do so based only on evidence received in an adversarial court hearing.⁴⁴⁵ Perhaps more importantly, such measures can minimize the need for such hearings.

To the extent that it is safe and practical, there should be clearly-defined rights of contact between the parent and child, which can be as limited as phone or video calls, supervised visits, or letters and small gifts. There can be a plan for increased visitation rights once benchmarks are met. The parties and court should also consider whether to provide other opportunities for engagement by the parent, such as involvement in decision-making regarding the child’s health care, education, religious upbringing, and other

⁴⁴¹ *In re Guardianship of Lantigua*, 133 A.3d 252, 257 (Me. 2016).

⁴⁴² Some probate courts that have attempted to fashion reunification plans and order services have been found to overstep their jurisdiction. Weisz & McCormick, *supra* note 18, at 209 (citing *In re Kaylee J.*, 55 Cal. App. 4th 1425, 1433 (Ct. App. 1997)).

⁴⁴³ GUGGENHEIM, *supra* note 101, at 203.

⁴⁴⁴ See ME. REV. STAT., tit. 18-C, § 5-206(4) (2019) (“A parent may copetition and be appointed as a coguardian of the parent’s minor child if the court determines a joint appointment with a nonparent is in the best interest of the minor and is made with the parent’s consent.”).

⁴⁴⁵ RELATIVES RAISING CHILDREN, *supra* note 151, at 78.

key aspects of the child's care. In some cases, it may be appropriate to allow the parent to be consulted or at least informed as part of decision making. Courts should also have clear authority to order the parties to engage in services and supports, including those that can be accessed through the public child welfare system.⁴⁴⁶

Michigan's guardianship law provides for the entry of a limited guardian placement plan. The law limits the contexts in which such plans can be used, but it is a useful improvement over the typical broad letters of guardianship.⁴⁴⁷ Maine and Vermont have enacted reforms that require detailed orders of appointment.⁴⁴⁸ Stand-by guardianship provisions can also serve as a useful model for how a parent can play a role in devising the guardianship itself.⁴⁴⁹ Such appointments enable a parent to grant authority to a non-parent for purposes of school enrollment, insurance, and health access. The model has been criticized for being too limited in its availability and based on an illness paradigm. A better model, critics note, would reflect the fact that parents may have such needs even when not facing a terminal illness.⁴⁵⁰

Guardianship laws should spell out a continued role for the court after the initial appointment, as appropriate in each case. The court should have the authority to monitor the guardianship plan, including the extent to which the parent has engaged with the child and any difficulties that may have come up between the parties in implementing the plan. The court should ensure that the guardian is fulfilling their duties without interfering with the parent's ability to reunify with their child. Such monitoring can include regular status conferences—the time frame for which can be adjusted for the situation.⁴⁵¹ In some cases it may be appropriate to require the guardian or a guardian *ad litem* to provide written reports.⁴⁵² The court can decide to revise or suspend the reporting requirement, such as if the parent has knowingly

⁴⁴⁶ This authority would need to be coupled with the availability of a range of services that are not tied to the child being in state custody. The Family First Prevention Services Act expands the categories of children and families entitled to federally-supported "prevention services" so to include contexts when the child is not in foster care. See CHILDREN'S DEFENSE FUND, *supra* note 427; Family First Prevention Services Act, Pub. L. No. 115-123, § 50711. Congress described the purpose of the new act as: "The purpose of this subtitle is to enable States to use Federal funds available under parts B and E of title IV of the Social Security Act to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services." *Id.* § 50702.

⁴⁴⁷ MICH. COMP. LAWS § 700.5205 (2018).

⁴⁴⁸ VT. STAT. ANN. tit. 14, §§ 2628–2631 (2018); ME. REV. STAT., tit. 18-C, § 5-206(1) (2019).

⁴⁴⁹ McConnell, *Standby Guardianships*, *supra* note 18, at 274; *supra* notes 231–234 and accompanying text.

⁴⁵⁰ Brandt, *supra* note 182, at 299; McConnell, *Securing the Care*, *supra* note 18, at 40–41; McConnell, *Standby Guardianships*, *supra* note 18, at 268–73. See also Czapanskiy, *supra* note 172 (discussing extra-judicial consensual co-guardianships).

⁴⁵¹ Federal law requires courts to hold judicial review hearings at least every 6 months if a child is in state custody. 42 U.S.C. § 675(5)(B) (2018).

⁴⁵² See, e.g., VT. STAT. ANN. tit. 14, § 2629(b)(6) (2018); ME. REV. STAT. tit. 18-C, § 5-207(3) (2019).

and intentionally waived it or has apparently abandoned the child.

This monitoring should aid the court and the parties in assessing the future course of the arrangement. If the parent is making progress addressing the underlying problem—for example, substance use—then adjustments to the order can be made, such as a progressive visitation schedule or some other way to increase the parents' engagement incrementally and safely. If the parent has disappeared, the court may make modifications to the visitation or reporting requirements as needed. In all cases, the court will have a track record of the guardian's and parent's conduct and the child's progress and needs, all of which will aid its decision making.

Finally, a guardianship statute should facilitate the *end* of the guardianship in a way that serves family law goals. The statute should have a clear termination procedure and standard that reflects the rights and relationships of the parties. If the parent desires to resume their role as primary caregiver of the child, the parties should be encouraged or required to participate in mediation to see if they can reach agreement about the future of the guardianship appointment. They may agree to end it immediately, or they may agree to modify the appointment to provide more of a role for the parent, including appointing the parent as a co-guardian. They may also decide to develop a transition plan to bring the guardianship to an end in the near future. If the parties are unable to reach an agreement, then the court will need to hold a hearing to evaluate the contested issues, such as the parent's current fitness and whether termination is in the best interest of the child.

The questions presented by a termination petition are difficult; the court should not see its role as limited to providing simple answers to them. Rather than being faced with the options only of maintaining or terminating the appointment, and regardless of whether the guardianship ends by agreement or court findings, the court should have the authority to order a transition plan by modifying the guardianship order for a period of time. Maine's guardianship statute and the UGCOPAA both include language authorizing courts to order transitional arrangements for a child.⁴⁵³ Where such arrangements are imposed over the objection of a parent who is fit to resume custody, such orders may infringe on the parent's rights. For that reason, they should be defined and limited in terms of both scope and time to address only what is essential to mitigate emotional or other potential harm to the child in the transition.

Statutes can equip courts with a range of strategies to employ in termination orders. Like the tailored provisions that may have been ordered originally, such transitional arrangements can include professionally supervised visits, individual and family counseling, or residence changes

⁴⁵³ UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROT. ARRANGEMENTS ACT § 211(f); ME. REV. STAT., tit. 18-C, § 5-211 (2017).

that are tied to the school year, permitting the parent to have more involvement in medical or educational decision-making, among other measures.⁴⁵⁴ In this context as well, the court should have the authority to enlist the assistance of a guardian *ad litem* to make recommendations and facilitate the parties' participation in the development of the plan.⁴⁵⁵

A separate but related question that can complicate a guardianship termination disputes is whether the guardian can or should have a legally-protected relationship to the child after the guardianship ends.⁴⁵⁶ It is a *separate* question because the purpose of guardianship is to provide a non-parent the legal authority to care for a child when a parent is unable to do so; the focus of both the appointment and termination determinations is on the child's need for care and the ability of a parent to provide such care. It is a *related* question because a close relationship may exist prior to or develop over the course of the guardianship, giving rise to concern for the child's interest in continuity of such relationship if the guardianship is terminated. For this reason, courts struggle with termination determinations because statutes fail to provide direction for courts about how to protect the interests and rights of the parent, guardian, and child.

Guardianship is not designed to be a parentage determination or a route to establishing permanent parental rights. Rather, it is a mechanism to appoint someone as a substitute parent in order to *protect a child* when a parent is unable to provide care. By contrast, states' parentage and custody laws address a wholly different need: *preserving a relationship* between a child and adult that is in the child's best interest. While it is preferable that the guardian have some prior connection with the child, the approval of the appointment is not based on the extent of any existing caregiving relationship. Thus, a guardianship should not remain in place solely to maintain a relationship created by the caregiving role. A guardianship statute that enabled a court to grant parental status or long-term custody or visitation rights to a guardian would be something other than a *child protection* measure: it would be a law that focuses on a non-parent's relationship with a child. If a guardianship appointment provides an explicit path to parental rights for the guardian, parents may be reluctant from the outset to allow a relative caregiver to be appointed or they may seek termination of an appointment simply to prevent such result. For these reasons, among others, guardianship statutes should not authorize a court to grant parental or other rights to guardians.

There is no simple solution to the complex question of the legal status of guardians when a guardianship is no longer needed. I do see two alternatives that may provide a more coherent approach when a fit parent

⁴⁵⁴ *In re* Guardianship of Stevens, 86 A.3d 1197, 1204 (Me. 2014) (citing 18-A M.R.S. § 5-213).

⁴⁵⁵ *Id.*

⁴⁵⁶ *See, e.g., In re* K.H., 773 S.E.2d 20, 32 (W. Va. 2015) (guardian as psychological parent); *Hartleib v. Simes*, 776 N.W.2d at 229 (N.D. 2009) (awarding grandparent visitation rights).

seeks to resume care and the child and guardian have a close relationship. First, as noted above, courts can use transitional arrangements specifically to address the potential impact on children of returning to their parent's care.⁴⁵⁷ These can include engagement of the child's counselor as well as a graduated schedule of contact. This can provide a child-focused approach to the transition that is based on the child's actual situation rather than on abstract speculation about the potential harm that could result from a change in custody after a long period of time.

The other way to address the question is for states to enact clear laws regarding non-parent custody, visitation rights, or non-exclusive adoption⁴⁵⁸ that are expressly based on the relationship between children and non-parents.⁴⁵⁹ As extensively discussed and persuasively advocated by many scholars, state laws can recognize and protect the relationship between children and adult caregivers.⁴⁶⁰ Such laws, however, cannot and should not replace minor guardianship, which has a specific and unique role in family law. Comprehensive and clear custody laws can eliminate a caregiver's attempted use of guardianships solely to create a permanent legal relationship with a child. Ideally, guardianship and custody laws are part of a state's comprehensive family law statutory scheme, with one court having

⁴⁵⁷ See, e.g., *In re SRB-M*, 201 P.3d 1115, 1121 (Wyo. 2009) (“[T]he district court retains the discretion to enter a reasonable order to assist the child in the transition from DM’s home to Mother’s home.”); Gupta-Kagan, *supra* note 166, at 100 (noting that where the returning parent is no longer unfit a court can order contact with the former caregiver to minimize harm to the child from the transition).

⁴⁵⁸ This would grant the caregiver a role as *parent*, thereby recognizing their role, while also preserving the parent's rights rather than terminating them as in most adoptions. It would provide stability to the arrangement while allowing the adults to share in the care of the child, even if the original parent's role remains very modest. See generally Gupta-Kagan, *supra* note 337, at 735–63; see also Coupet, *supra* note 129, at 651–56; Gupta-Kagan, *supra* note 166, at 51–57.

⁴⁵⁹ Some scholars—addressing third-party custody laws generally—have advocated for use of a “harm” standard to preserve a child's relationship with a non-parent even in the absence of parental unfitness, but it requires something more than a showing of best interests. Gupta-Kagan, *supra* note 166, at 94–100. And even if the parent resumes custody of the child in such a case, a recognition of the relationship may permit the former caregiver to have some visitation rights. *Id.*

⁴⁶⁰ Sacha Coupet has advocated for the development of “Kinship Adoption,” which is very similar to permanency guardianship but outside of the child protection context and with no requirement of a prior adjudication of unfitness. Coupet, *supra* note 129, at 651–53. It is an adoption that does not require termination of parental rights, and the parents would have residual rights while caregiver would have formal legal authority of a parent as well, so it resembles *de facto* parent as well. Elizabeth Barker Brandt has advocated for the adoption of “*de facto* custodian” statutes, which would provide a route to legal authority for relative caregivers without requiring a finding of unfitness but based on the existing relationship between the caregiver and the child. Brandt, *supra* note 182, at 312–13. All of these models would have high threshold standing requirements—including proof by clear and convincing evidence—in recognition that litigation in itself can represent a significant intrusion into the parent's constitutional rights. *Id.* at 312; Gupta-Kagan, *supra* note 166, at 108–09. This can be structured in a way that moves beyond the conjugal-dyad model to recognize and preserve relationships based on the actual history rather than the status of the individuals involved with respect to each other and the child at the center. See Coupet, *supra* note 129, at 645–55 (advocating for expanded definition of “parent” to include caregivers outside of the conjugal-dyad context); Gupta-Kagan, *supra* note 166, at 86–113 (advocating for relationship-based third-party custody statutes); HUNTINGTON, *supra* note 15, at 87 (noting how family law's “rule of two” limits recognition of other caregivers' relationships with a child); Murray, *supra* note 35, at 442–54.

jurisdiction over all such matters.

As a final note, the focus of this article is minor guardianship as child protection, but, to serve those policy goals, extensive reforms are needed to the public child welfare system as well. I have addressed here only the most crucial problems in minor guardianship and suggested only the most essential revisions. Courts, advocates, and policymakers should use the lessons of the minor guardianship as child protection to consider a broader set of problems and undertake a broader set of reforms as well. As Clare Huntington has observed: “[W]hat the state calls ‘preventive services’—counseling, substance abuse treatment, and so on—are offered only after the family has come to the attention of the authorities and it is deemed to be at risk of abuse and neglect. Often, this is too little, too late.”⁴⁶¹ States need to provide families at risk with ongoing prevention services that actually do in fact preserve families, reducing the need for any child protection measures.

When a child cannot remain in their parent’s care, state CPS agencies should look to relatives as a potential resource. But to avoid the inequities resulting from most “kinship diversion” practices, public CPS agencies need to reframe kinship care not as diversion (away) but as part of a holistic strategy, and minor guardianship can play an appropriate role in that, if the above reforms are made.⁴⁶² Child welfare agencies should also make more use of and reduce the barriers to kinship placement, guardianship, and nonexclusive adoption for those instances when they do take a child into custody. Most importantly, as many other scholars have urged, policymakers should examine and address the underlying causes of family crises—particularly economic, racial, and gender inequality—so that there is less of a need for invasive child protection measures, whether public or private.⁴⁶³

V. CONCLUSION

Guardianship as a form of child protection is, in important respects, invisible; there is limited data about its prevalence and the families involved.⁴⁶⁴ Because both federal and state laws have extensive data collection requirements for public agencies, we have much more information about permanency guardianship, kinship placement, and, to a

⁴⁶¹ HUNTINGTON, *supra* note 15, at 94. As she points out, this lack of adequate services earlier leads to more drastic intervention later “because the family has fallen apart to such a great degree.” *Id.* at 94.

⁴⁶² For example, the Annie E. Casey Foundation’s 2013 Report on Kinship Diversion urged public child welfare agencies to develop models for “supported diversion,” which would include risk assessment, services, permanency planning. AECF, *supra* note 158, at 12–14. One other feature the report encourages to help the child and relative caregiver move out of “legal limbo” by obtaining guardianship or an equivalent form of custody, to ensure that the caregiver can enroll the child in school, obtain healthcare, and make day to day decisions on behalf of the child. *Id.* at 12.

⁴⁶³ See *supra* note 276 and accompanying text.

⁴⁶⁴ Maine’s probate courts are not centralized and therefore a study of the use of minor guardianships required a county by county examination of filings to identify the numbers. Smith, *supra* note 23, at 79.

limited extent, kinship diversion. While we do have some information about the history and use of minor guardianship from a range of sources, none of it is grounded in empirical research.

As noted at the start of this article, minor guardianship is itself a bit of an orphan in terms of scholarly research. Scholars, advocates, and service providers have described their observations and experiences with minor guardianship,⁴⁶⁵ and practices—or, more specifically, controversies—relating to its use are reflected in reported court opinions. Media reports about relative caregivers frequently mention it in passing.

But, contrasted with the families involved with public child welfare system, we know little about families' attempts to use guardianship to manage a situation without public intervention. Because minor guardianship is *private*, we don't know the extent of this phenomenon—its patterns, trends, and demographics—how it reflects the needs of children and families today. We do not know how many families pursue minor guardianship, or the reasons they choose to do so, or the consequences of their choice. We also need to understand why some relative caregivers never seek legal authority regarding the child in their care. For example, is it because they are sharing some degree of co-parenting with a parent, who can ensure that the child is enrolled and has access to medical and other services, because the parent will not consent, or because the caregivers lack access to information and assistance needed to pursue guardianship?

The implications of this invisibility are significant. The reforms outlined in Part IV will be most effective if they reflect the reality on the ground. One of the aims of this Article is to demonstrate that minor guardianship is an increasingly important social and legal trend, but it is also a story that needs closer examination. Far more research is needed to uncover the prevalence, causes, and outcomes for the guardianship choices families make today. In particular, without closer understanding of the short and long-term outcomes for families, we have no way of knowing how many parents and children have been unable to reunite, to any degree, because the guardianship process has failed to provide a path to such result. Data reflects the thousands of children in kinship care; we do not know how many of those could be with their parents but for the fact that their family pursued a route that did not facilitate a return to their parent's care.⁴⁶⁶ Without question, there are

⁴⁶⁵ For example, both Maine and Vermont have received conducted reviews of the use of minor guardianship in the respective states but the reports were not based on a data compilation and analysis. ACT 56 MINOR GUARDIANSHIP COMM., *supra* note 190; ME. FAMILY LAW ADVISORY COMM'N, REPORT ON MAINE PROBATE CODE PARENTAL RIGHTS PROVISIONS TO THE MAINE LEGISLATURE JOINT STANDING COMMITTEE ON JUDICIARY PURSUANT TO RESOLVE 2016, C. 73, SECTION 3 (2017) (report on file with author). I was involved with the Maine Family Law Advisory Commission's review of minor guardianship. The findings in that report were based primarily on case law and interviews with dozens of stakeholders, including state and probate judges, attorneys, guardians *ad litem*, and relative caregivers.

⁴⁶⁶ See, e.g., Deanna Hackey, *This Photo of a Mom Overdosing As Her Baby's in the Back Seat Saved Her Life*, CNN (Oct. 31, 2017), <https://www.cnn.com/2017/10/30/health/indiana-mom-overdose->

significant practical barriers to collecting the data needed to fill these gaps in our knowledge. I hope that empirical researchers will find a way to undertake the research needed to enable us to better understand this trend, to identify the lessons it has to offer, and to better meet the needs of the children and families involved.

As described in this Article, families' use of minor guardianship to address a child's need for care and safety reflects the stressors on and inadequacies of the public child welfare system. Since the initial development of that system, it has faced and been shaped by broader societal problems that can lead to instability in large numbers of families. These problems included war, migration, poverty, mass incarceration, and widespread illnesses such as AIDS, which can overwhelm caseloads and bring the inherent tensions in child welfare policy into sharp focus. The opioid crisis has the potential to dwarf these earlier challenges by comparison, and it shows few signs of abating. It has never been more important for policymakers, service providers, scholars, and attorneys to ensure that families and the institutions that serve them are equipped to provide children the care they need and to provide parents the support, tools, and compassion they need to remain in their children's lives.

photo-trnd/index.html (describing a young mother who went from a high-profile overdose in her car to sobriety and employment, and noting “[s]he also cares for her son, but her mom has guardianship”).