

Guarding Adoption while Subsidizing Guardianship

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Federally subsidized guardianship would be a positive reform to the foster care financing system and can be achieved without undermining children's interests in adoption. A loving, permanent family through adoption should always be considered before choosing guardianship as the permanency plan for a child in foster care. But for some children guardianship will be the best permanency option. In such cases, it seems fair that these vulnerable children are as entitled to receive subsidies as are children adopted out of foster care.

The federal Adoption and Safe Families Act (ASFA) defines a legal guardian as the caretaker in a “judicially created relationship ... which is intended to be permanent and self-sustaining as evidenced by the transfer of the following parental rights with respect to the child: protection, education, care and control of the person, decision making.”¹ Unlike some children in the care of adoptive and foster parents, children in the care of legal guardians are not eligible to receive federal subsidies under Title IV-E of the Social Security Act. Believing that this permanency option should also be encouraged for some children, many child welfare advocates are therefore asking Congress to enact federally subsidized guardianship that provides children in foster care subsidies for guardianship comparable to those for adoption. Recently, members of Congress have proposed two pieces of legislation both entitled the Kinship Caregiver Support Act, that would amend Title IV-E to provide for federally subsidized guardianship. These are H.R. 2188, introduced by Rep. Davis (D-IL) and Rep. Johnson (R-IL), and S. 661, introduced by Sen. Clinton (D-NY) and Sen. Snowe (R-ME).

A fundamental principle of child welfare is that every child has the right to a loving, permanent family. Reunification and adoption, the two most common case goals for children in foster care, aim to provide children with loving, permanent families. Guardianship with either a relative or another adult can be the best option for a child. But in considering guardianship, policymakers and placement decision makers should be mindful that it may

not provide the child legal permanence with a stable family because the guardian's legal relationship with the child ends when the child reaches the age of majority. Nor does guardianship provide children entitlement to inheritance should the legal guardian die without a will, as families formed through birth or adoption do.

Because adoption unambiguously places a child with a loving, permanent family, in subsidizing guardianship policy makers should take care to guard the child's interest in a permanent family through adoption. A key policy to protect this interest is to require that the permanency court explicitly rule, with written explanation guided by the best interests of the child, that neither reunification with the child's original family nor adoption are appropriate permanency options for the child. This ruling out of adoption before choosing guardianship is comparable to the ruling out of reunification that is required before choosing adoption.

Some instances when even the most passionate adoption advocate can agree that guardianship is the best permanency option that exists for a particular child in foster care include:

- When a child is being cared for by a relative who wishes and is able to make a legally binding commitment, but does not want to disrupt existing family relationships by terminating the parents' parental rights;²
- When an adolescent fourteen years of age or older who clearly understands his or her options chooses guardianship because he or she doesn't wish to be adopted, but wants to forge a permanent, legal connection with his or her caregiver;³
- When it is in the best interest of a child below the age of fourteen to maintain his or her relationship with a sibling under a guardian's care; and
- When a parent's physical, emotional, or cognitive disability prevent him or her from caring effectively for the child, but where termination of parental rights is undesired and unwarranted.⁴

Because situations such as those described above may change, and because adoption does, generally speaking,

have advantages over guardianship as a permanency option, subsidized guardianship should not preclude the child's legal guardian from pursuing adoption at a future date, nor from receiving adoption assistance benefits should he or she adopt the child. However, when guardianship is the best alternative for a child in foster care, the child is equally deserving of a subsidy for guardianship, comparable to that allowed for children adopted out of foster care. Similarly, a child should meet the same eligibility requirements for guardianship assistance as for adoption assistance.

We must ensure that the initiation of subsidized guardianship does not negatively affect adoption, and that state agencies and prospective caregivers choose guardianship because it is in the best interests of the child, not because it may be the easier option. Thus, while subsidizing guardianship, the existing preference for adoption in the incentivization of states should be maintained.

Subsidized guardianship should be considered only when the following four criteria have been met:

- The child has been removed from his or her home and the state child welfare agency is responsible for the child's placement and well-being;
- The state agency has responsibility for the child's placement and well-being;
- A court has explicitly ruled that neither reunification with the child's original family nor adoption are appropriate permanency options for the child;
- A strong attachment already exists between the child and a potential legal guardian who is willing and able to care permanently for the child.⁵

Placements that continue to expose a child to the unsafe parent or parents, from whose home he or she was removed, can create a unique challenge in ensuring the

continued safety of the child. Because guardianship placements are often with family members or friends, they may keep a child within reach of his or her abuser. While placing children with guardians who maintain contact with or are themselves a part of the original family can be beneficial, state governments and agencies must ensure that children so placed are not at risk of further episodes of abuse. In this regard, it is heartening to note that there is strong evidence subsidized guardianship is as safe a permanency option as adoption.⁶

In conclusion, while subsidizing guardianship, the child welfare system should continue to protect the interest that children in foster care have in a legally permanent family through adoption. There are specific circumstances in which guardianship may be the best permanency option for a child. In such cases, guardianship may be subsidized without undermining the child's interest in adoption, if the policy ensures that legal guardians are not offered subsidies beyond what adoptive and foster parents receive. Any legislation considered by Congress should require that reunification and adoption have been considered and ruled out through a written judicial determination before subsidized

guardianship becomes the case plan.

Most advocates of subsidized guardianship agree with the guidelines explained herein. To minimize the risk of harmful unintended consequences for children in foster care who may benefit from adoption, it is important that policy makers keep these principles in mind if they move forward in subsidizing guardianship. If these principles are followed, subsidized guardianship has the potential to positively impact the lives of many thousands of American children in foster care. It should therefore be welcomed as an important part of comprehensive reform of the federal foster care financing system.

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1. *Adoption and Safe Families Act (ASFA)*, Public Law 89, 105th Cong., 1st sess. (November 19, 1997).

2. The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care* (2004): 21-22. Available online at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

3. Ibid.

4. Ibid.

5. The Pew Commission, *Fostering the Future*: 22-23.

6. Testa, M. F., Cohen, L., & Smith, G. *Illinois subsidized guardianship waiver demonstration: Final evaluation report*. (2003) Rockville, MD: Westat: Page 55. Available online at <http://cfrwww.social.uiuc.edu/pubs/pdf.files/sgfinalreport.pdf>.