

An Analysis of State Law and Policy Regarding Subsidized Guardianship for Children: Innovations in Permanency

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Abstract

This study of state guardianship statutes and administrative codes was guided by a desire to understand how individual states were supporting – or not supporting – guardianship placements for children involved with the public child welfare system. The study analyzes state statutes and administrative codes pertaining to guardianship policy regardless of whether the state uses federal IV-E funds to support the guardianship placement. Beginning with an analysis of the federal Guardianship Assistance Program (GAP) legislation, alignments and divergences between state and federal law were examined. In order to use Title IV-E money for guardianship subsidies, states must follow the general parameters of federal legislation. However, there are areas where the states can exercise their discretion and either expand or narrow their individual GAP programs. Variations in four domains were found: (1) eligibility criteria for guardianship; (2) supports to families – both financial and in services; (3) post guardianship management and reporting; and (4) parental rights and responsibilities.

Clearly, states vary in how they approach these issues. While many states expand the funding and services that guardians may apply for and receive beyond the minimum called for in federal law, other states choose to more strictly follow the federal guidelines. Overall, our research findings reveal a patchwork of GAP, guardianship, and kinship caregiver laws across the states. These laws suggest that the states are inclined to support opportunities for subsidized guardianship and are supporting guardianship in state laws and regulations. At the same time, states must grapple with the enduring nature of birth parent rights, and are seeking ways to balance the rights of parents and guardians with the interests of children's stability.

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I. Introduction

According to the National Child Abuse and Neglect Data System (NCANDS), every year in the United States (U.S.), about 702,000 unique children are confirmed as victims of child maltreatment.¹ In federal fiscal year 2014, NCANDS data showed that, as in prior years, the greatest proportion of child victims suffered neglect.² (It should be noted that a child who may have suffered from multiple forms of maltreatment is counted once for each maltreatment type.) Moreover, Child Protective Services (CPS) investigations determined that 75.0 percent of victims were neglected, 17.0 percent were physically abused, and 8.3 percent were sexually abused. In addition, 6.8 percent of victims experienced such “other” types of maltreatment as “threatened abuse,” “parent’s drug/alcohol abuse,” or “safe relinquishment of a newborn.”³

The vast majority of maltreated children remain with their families after the initial crisis is addressed or some kind of ongoing service is provided. But on any given day in 2014, nearly 415,000 children in the U.S. were living in foster care.⁴ Most of these children were placed into out-of-home care because of some form of parental neglect, while others had experienced physical, sexual, or emotional abuse. While in out-of-home care, many children experience multiple placements which research has correlated with an increase in emergency room hospital visits, behavioral health problems, loss of social support networks, delayed permanency, and (in young men) higher rates of criminal justice system involvement.⁵ Thus, one of the most pressing goals of public

¹ *Child maltreatment 2014*, CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN. & FAMILIES, ADMIN. ON CHILDREN, & YOUTH & FAMILIES 21 (Jan. 25, 2016), <http://www.acf.hhs.gov/sites/default/files/cb/cm2014.pdf>.

² *Id.* at 25.

³ *Id.*

⁴ *The AFCARS Report No. 22: Preliminary FY 2014 Estimates as of July 2015*, CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS. 1 (Jul.2015), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf> [hereinafter CHILDREN’S BUREAU].

⁵ See, e.g., Peter J. Pecora & Danielle Huston, *Why Should Child Welfare and Schools Focus on Minimizing Placement Change as Part of*

child welfare services is to ensure that children rapidly and safely achieve family permanency. For the majority of children, reunification with parents is the primary goal. However, when reunification is not possible, adoption by or legal guardianship with a caring adult are the primary alternatives.⁶

A. *Fostering Connections Act*

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections Act)⁷ in order to help bring permanent placement with relatives to children who remained in foster care for too long.⁸ In part, this Act established the Title IV-E GAP, which allows federal funds to be used as subsidies for relative guardians of children. An important purpose of the Act was to incentivize the use of guardianships. As of this writing, 32 states, the District of Columbia and six tribes offer GAP. Under the Act, states are able to use federal funds to provide financial assistance to relative guardians who are committed to

Permanency Planning for Children?, 41 SOC. WORK NOW 19 (2008); David M. Rubin et al., *Placement Changes and Emergency Department Visits in the First Year of Foster Care*, 114 PEDIATRICS e354 (2004); Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. & YOUTH SERV. REV. 227 (2004); Nancy Rolock et al., *Multiple Move Study: Understanding Reasons for Foster Care Instability*, (Nov. 2009), http://cfrc.illinois.edu/pubs/rp_20091101_MultipleMoveStudyUnderstandingReasonsForFosterCareInstability.pdf.

⁶ CHILDREN'S BUREAU, *supra* note 4, at 3; *Child Welfare Outcomes 2010–2013: Report to Congress 11*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS. 14 (2016), http://www.acf.hhs.gov/sites/default/files/cb/cwo10_13.pdf [hereinafter *Report to Congress*].

⁷ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.).

⁸ MaryLee Allen et. al., *Making It Work: Using the Guardianship Assistance Program (GAP) to Close the Permanency Gap for Children in Foster Care*, CHILDREN'S DEFENSE FUND & CHILD TRENDS 3 (Oct. 2012), <http://www.childrensdefense.org/library/data/making-it-work-using-the.pdf>.

permanently caring for their children.

In general, the Fostering Connections Act is intended to shape states' subsidized guardianship policies and practices by placing conditions on the use of federal IV-E dollars. In particular, the Act requires that:

- The guardian be a relative of the child (although the law does not define “relative”);
- The guardian has a strong commitment to caring permanently for the child and has cared for the child in a licensed foster care home for at least six consecutive months;
- The guardian be licensed as a foster parent and pass criminal record and child abuse registry checks;⁹
- The child must meet the current eligibility for Title IV-E funds;
- Any child age 14 or older must be consulted about the guardianship;
- Reunification and adoption must be ruled out as appropriate permanency options for the child; and
- The state match federal funds with state dollars.¹⁰

If states are not able to meet these requirements, they may – in their discretion – fund a guardianship program with

⁹ Licensure of foster parents is an administrative decision made by child welfare agency personnel. States have discretion when determining whether a guardian should be licensed or whether there are acceptable waivers to licensing requirements. In certain situations, obtaining a license can discourage certain individuals from applying to be a guardian. See Lydia Killos, William Vesneski, Rebecca Rebbe, Peter Pecora & Steve Christian, *Subsidized Guardianship Policy and Program Implementation: An Analysis of Policy and Program Design in Fifty States*, CASEY FAMILY PROGRAMS (forthcoming 2017).

¹⁰ See 42 U.S.C. §§ 671(a)(20)(C) & 673(d); Fostering Connections to Success and Increasing Adoptions Act of 2008 § 101(b)-(c).

their own funds. Though the Act allows states to pay relative guardians up to the same rate as the state's foster care subsidy, the Act does not allow states to pay relative caregivers a rate greater than the foster care subsidy.

While the federal guardianship statute sets out a basic framework for subsidized guardianship (GAP) programs, including eligibility requirements, the states retain discretion to shape and develop their programs in unique ways. For example, states have the ability to modify some eligibility requirements, provide supports to families beyond the monthly financial subsidy called for in federal law, and formulate the terms of the agreement between guardians and the states. Perhaps most importantly, even though the Act does not directly address the issue of parental rights, state-subsidized guardianship programs can affect these rights depending on how each state implements GAP.

B. The Present Study

Given the uncertainty surrounding parental rights and the relatively recent enactment of the Fostering Connections Act, we initiated a research project to expand our understanding of relative guardianship statutes and administrative codes. Overall, our research was guided by this key question: *How do state statutes and administrative codes support (or fail to support) relative guardianship as a permanent placement option for children in foster care?* In short, by analyzing state guardianship statutes and policies, we sought to understand how states were shaping the role of relative guardianships within their child welfare system.

C. Previous Research

Kinship care, probably the most common precursor to family foster care, may have origins in ancient Jewish laws and customs, wherein “children lacking parental care became members of the households of other relatives, if such there were, who reared them for adult life.”¹¹ Today, children from

¹¹ WILLIAM H. SLINGERLAND, CHILD-PLACING IN FAMILIES 27 (Russell Sage Found. 1918).

every culture continue to be raised by their kin when parents are unable to fulfill the parental role. Children are placed in out-of-home care and, in some cases, kinship care after they have been removed from their parents because of maltreatment or, in certain cases, where the child's emotional and behavioral problems are beyond the caregiver's capacity to manage.¹² Kinship care has become a preferred option for many child welfare systems in the U.S. when children cannot be reunified with their parents.¹³ In 2014, 29 percent of the 415,000 children in care were living in relative foster homes.¹⁴

Children of color are overrepresented in the foster care population, and yet kinship care is more heavily used by families of color to care for vulnerable children.¹⁵ In fact, African American children comprise 24 percent of all children in foster care, Hispanic children 22 percent, Native American children 2 percent, and Asian American children 1 percent.¹⁶ Of all the children in care, 45 percent had case plan goals other than reunification with their parents or principal caretakers. The children who exited foster care in 2014 were discharged through a variety of avenues, including adoption (21 percent), guardianships (9 percent), and living with other relatives (7 percent).¹⁷

In many states, kinship care (including guardianship) has become an increasingly common practice in child welfare systems. Thus, it is imperative that states conduct a rigorous

¹² See KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH (Rebecca L. Hegar & Maria Scannapieco eds., Oxford Univ. Press 1999); Sigrid James, *Why do Foster Care Placements Disrupt? An Investigation of Reasons for Placement Change in Foster Care*, 78 SOC. SERV. REV. 601, 612 (2004).

¹³ CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES AND PROGRAMS 521 (Gerald P. Mallon & Peg M. Hess eds., Columbia Univ. Press 2005).

¹⁴ CHILDREN'S BUREAU, *supra* note 4.

¹⁵ KINSHIP FOSTER CARE, *supra* note 11, at 97.

¹⁶ CHILDREN'S BUREAU, *supra* note 4, at 2 (explaining that white children comprise 42%, children of two or more races 7%, and children whose race/ethnicity was unknown 3%).

¹⁷ *Id.* at 3.

evaluation of the benefits and risks associated with kinship care and guardianship, including the potential that a child will return to foster care after being placed in a “permanent” home with a guardian. In other words, the success of guardianship must be gauged not by how quickly and how many children are placed in seemingly permanent guardianships, but instead, by how many children remain in these placements—in stable homes.¹⁸

Our research was informed by several previous studies and systematic reviews that have evaluated permanency outcomes for children who exit from kinship placements, as well as subsidized guardianships.¹⁹ Results of these studies indicate wide variance from state to state in the direction and size of associations between kinship and children’s legal permanency status, although most studies span between one and five states rather than address a national scope of state data. However, many of these studies found that children in kinship care had fewer placement changes.²⁰ Further, rates of re-entry into foster care may be even lower when children are placed with legal guardians. For example, in a systematic scoping review, Bell and Romano found that across studies, children in kinship care experienced greater permanency in terms of lower rates of reentry to foster care, greater placement stability, and more guardianship placements in comparison to children living with foster families.²¹ Children

¹⁸ See Eun Koh & Mark Testa, *Children Discharged from Kin and Non-kin Foster Homes: Do the Risks of Foster Care Re-entry Differ?* 33 CHILD. & YOUTH SERV. REV. 1497 (2011).

¹⁹ See, e.g., Jeanne A. Howard et al., *A Comparison of Subsidized Guardianship and Child Welfare Adoptive Families Served by the Illinois Adoption and Guardianship Preservation Program*, 32 J. SOC. SERV. RES. 123 (2006); Eun Koh, *Permanency Outcomes of Children in Kinship and Non-Kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILD. & YOUTH SERV. REV. 389 (2010).

²⁰ See, e.g., Marc Winokur et al., *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment*, COCHRANE DATABASE SYS. REV. (Jan. 31, 2014), <http://onlinelibrary.wiley.com/doi/10.1002/14651858.CD006546.pub3/epdf>.

²¹ Tessa Bell & Elisa Romano, *Permanency and Safety Among Children in Foster Family and Kinship Care: A Scoping Review*, TRAUMA,

in kinship care, however, had lower rates of adoption. Findings for child safety outcomes were mixed.²²

Across the states, foster care entry rates and length of stay in out-of-home care vary substantially.²³ Individual, family, community-level and socio-economic factors have been found to influence these variations but each may act differently to influence certain outcomes.²⁴ Work by Russell and Macgill indicates that geographic sources of variance may be associated with different factors. For example, state cultural orientations and socioeconomic factors (such as community values, demographics, policy, and state expenditures) together best explain *foster care entry rates*, whereas child welfare policy and practice (such as state welfare expenditures, including administration and operation of maltreatment prevention services, family preservation services, child protective services, out of home placements and adoption services) – when considered together – best explain *average lengths of stay in foster care*.²⁵ Therefore, it stands to reason that interventions aimed to change the length of time children spend in care will be most effective if

VIOLENCE, & ABUSE 1, 9 (2015),

<http://tva.sagepub.com/content/early/2015/10/09/1524838015611673>.

²² *Id.* at 12.

²³ Among the states, the foster care entry rate ranged from 1.3 children per 1,000 to 8.6 children per 1,000 in a state's population. *Report to Congress, supra* note 6, at ii (discussing foster care entry rates); *Federal Foster Care Data System Reports*, CHILDREN'S BUREAU, <http://www.acf.hhs.gov/programs/cb/research-data-technology/reporting-systems/afcars> (last visited Jul. 9, 2016). *See also id.* at 35-365 (discussing length of stay in foster care). For state variations in foster care entry and lengths of stay, *see* Jesse Russell & Stephanie Macgill, *Demographics, Policy, and Foster Care Rates: A Predictive Analytics Approach*, 58 CHILD. & YOUTH SERV. REV. 118, 122 (2015).

²⁴ *See, e.g.*, FRED WULCZYN & KRISTIN B. HISLOP, *FOSTER CARE DYNAMICS IN URBAN AND NON-URBAN COUNTIES* (2002) (discussing how foster care entry rates and length of stay vary by community); FRED WULCZYN & BRIDGETTE LERY, *RACIAL DISPARITY IN FOSTER CARE ADMISSIONS*, (2007) (discussing how foster care entry rates and length of stay vary by race but also differ by community).

²⁵ Jesse Russell & Stephanie Macgill, *Demographics, Policy, and Foster Care Rates: A Predictive Analytics Approach*, 58 CHILD. & YOUTH SERV. REV. 118, 123 (2015).

targeted at state and county child welfare policies and practice.

II. Study Approach

This study analyzes state statutes and administrative codes pertaining to guardianships for children in the child welfare system. States use a variety of financial strategies to support guardianships, including – for many – the use of federal IV-E funds. While recognizing the importance of these financial mechanisms, our primary focus is on describing the underlying laws and legal frameworks that support kinship guardianship across the country. A detailed description of the varied financial approaches to and funding sources for kinship guardianship is beyond the scope of this research.

Data for our analysis included state statutes and codes pertaining to subsidized guardianship as well as a previous detailed review of guardianship law (“Making It Work,” a collaborative effort led by the Children’s Defense Fund).²⁶ A research assistant, who is an attorney, used Westlaw to find additional guardianship-related materials for analysis. Citations to the materials, statutes, and regulations that were analyzed can be found in Appendix A.

We used content analysis techniques to complete the study. Content analysis refers to a family of analytic techniques that range from “impressionistic, intuitive, interpretive analyses to systematic, strict textual analyses.”²⁷ Content analysis was selected because it is well suited to the empirical study of legal texts. Indeed, the analytic technique underlying it resembles the process of legal reasoning, including the systematic reading of materials, identification and coding of their consistent features, and drawing of inferences about their uses and meanings.²⁸

²⁶ CHILDREN’S DEFENSE FUND, *supra* note 8.

²⁷ Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RES. 1277, 1277 (2005).

²⁸ Mark A. Hall & Robert F. Wright, *Systematic Content Analysis of*

Our analysis consisted of three stages. First, we conducted a search of individual state statutes, codes, and materials for key terms and provisions that appear in the federal GAP legislation. This search was initially focused on guardianship eligibility criteria and subsidy amounts, regardless of funding mechanism. As this initial search progressed, a number of important terms and provisions emerged from the data that were not included in the federal law. During the second stage, these emergent terms and provisions were recorded and the data were subsequently searched. We then completed an iterative process to identify and code key terms and provisions in order to develop, modify, and condense the major themes into groups.²⁹ The second stage of the analysis concluded when we could no longer identify any additional terms or provisions. During the third phase of the analysis, we developed descriptions of the terms and provisions and identified excerpts that best reflected the meanings of the groupings.

This paper presents the key groupings of terms of provisions identified during our analysis. We provide the frequency with which we found key provisions in statutes or codes. For purposes of this analysis, we found that some state materials are highly detailed while others are more skeletal and only address key features of guardianship programs. In addition to this disparity between states, we also found occasional inconsistencies and conflicts within a state's own statutory provisions and administrative codes. We used the "Making it Work" report – and its descriptive analysis of state guardianship policies – to help reconcile these conflicts. Just

Judicial Opinions, 96 CAL. L. REV. 63, 64 (2008) ("This method comes naturally to legal scholars because it resembles the classic scholarly exercise of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance."). See also Vicki Lens, *Welfare and Work Sanctions: Examining Discretion on the Front Lines*, 82 SOC. SERV. REV. 197 (2008).

²⁹ See U. H. Graneheim & B. Lundman, *Qualitative Content Analysis in Nursing Research: Concepts, Procedures and Measures to Achieve Trustworthiness*, 24 NURSE EDUC. TODAY 105, 107-08 (2004) (describing how they analyze "meaning units," reduce them to "condensed meaning units" and then code them by "sub-theme" and "theme.").

as important, not all of the terms and provisions we analyzed are addressed by all 50 states and Washington, D.C.; the frequency with which these terms are missing from statutes is identified in our findings.

III. Guardianship Eligibility Criteria

A. Variation in State Policies

Federal GAP legislation identifies a number of criteria for determining whether both children and relatives are eligible to enter into a federally subsidized guardianship relationship. (All of the federal criteria are presented in Appendix B.) Perhaps most significantly, relatives are required to be licensed foster care providers. However, state eligibility criteria do not always appear in state law and when they do, they frequently vary across the states.³⁰ Because of this ambiguity, we initially focused on identifying children's eligibility for guardianship placement.

More specifically, we sought to determine whether state laws and policies varied from the federal criteria. While states must follow the federal criteria in order to use Title IV-E funds, they retain some discretion to adjust those criteria where only a minimum has been set by federal law. (Naturally, states that do not seek federal support have greater freedom in setting their guardianship parameters.) We identified three criteria where the states might modify or establish different eligibility requirements beyond the federal minimum, and we found variation among the states in each of these areas:

- The eligible age for subsidized guardianship
- The age for children's input into establishing a guardianship decision
- Whether fictive kin can serve as guardians

³⁰ *States' Subsidized Guardianship Laws at a Glance*, CHILDREN'S DEFENSE FUND 2-4 (Oct. 2004), http://www.grandfamilies.org/Portals/0/documents/Resources/Subsidized%20Guardianship%20Resources/guardianship_laws.pdf.

B. Eligible Age for Subsidized Guardianship

Federal law indicates that a subsidized guardianship is available to a child who is an “. . .individual who has not attained 18 years of age”³¹ Essentially, this means that guardianship extends until age 18. However, federal law also permits states to exercise their discretion to extend Title IV-E GAP eligibility to a maximum of 21 years.³²

The majority of states have modified the age limit so that just over half (26 states) allow children to remain in guardianship until age 21; eight states allow it until age 19. Fourteen states follow the federal guidelines and cap guardianship eligibility at age 18. Three states did not specify an age in publicly available policies or statutes and, thus, presumably, cap guardianship eligibility at age 18. In general, this variation suggests that majority of states have chosen to make guardianship more appealing to families by allowing for a longer period of support.

It is important to note that federal law sets out conditions that must be met in order for the federal subsidy to extend beyond 18 years of age. These conditions are described in the Fostering Connections Act as follows: completing a secondary program, being enrolled in a post-secondary or vocational education program, participating in a program designed to reduce barriers to employment, being employed at least 80 hours a month, or having a medical condition that prevents these activities.³³

C. Age of Input into Establishing Guardianship

In addition to the maximum age of subsidy support, federal GAP legislation sets age 14 as the minimum age at which a child must be “consulted regarding the kinship

³¹ Fostering Connections to Success and Increasing Adoptions Act of 2008 §201(a).

³² 42 U.S.C. § 675(8)(B); Fostering Connections to Success and Increasing Adoptions Act of 2008 § 201(a)(B)(iii).

³³ 42 U.S.C. § 675(8)(B); Fostering Connections to Success and Increasing Adoptions Act of 2008 § 201(a)(B)(iv).

guardianship arrangement.”³⁴ In other words, federal law requires that children above a certain age have a say in the guardianship decision. In this regard, a number of states also vary from the federal policy, although with less frequency. Specifically, eight states allow children as young as 12 years of age to provide input into the guardianship decision; thirty-two states identify 14 years as the minimum age; and eleven states do not specify an age in the materials we examined. This finding suggests that some states believe that younger children should have a role in decision-making, while other states are exercising more caution towards involving younger children in the guardianship decision.

D. Fictive Kin Eligibility

While federal GAP legislation requires guardianship placement with a “relative,” it only explicitly mentions grandparents. It is otherwise silent on the definition of a relative. Specifically, the Act states that its purpose is to enable the states “. . . to provide kinship guardianship assistance payments on behalf of children to grandparents and other relatives who have assumed legal guardianship of the children”³⁵ Consequently, states have the discretion to limit the definition of relatives to those people related by blood, marriage, or adoption, or to further expand their definitions to fictive kin—individuals with whom the child has a close relationship, such as close family friends. Federal legislation also does not define kin in terms of tribal clan membership for Native American families but again leaves that to the states to address.

Given the absence of a federal definition in GAP legislation, we were interested in understanding how the states approach the meaning of “relative.” During our analysis, we found that most states do not explicitly define relative in their guardianship statutes. Consequently, we referred to other provisions in state law and policy (such as

³⁴ 42 U.S.C. § 673(d)(3)(A)(iv); Fostering Connections to Success and Increasing Adoptions Act of 2008 § 101(b)(3)(iv).

³⁵ 42 U.S.C. § 671(a)(28); Fostering Connections to Success and Increasing Adoptions Act of 2008 § 101(a).

the “Definitions” provisions at the beginning of the state statutory sections concerning dependency) to determine the term’s meaning.

In examining these various statutes, we found that forty-one states allow a relative or fictive kin to serve as a guardian, while ten states require that a guardian be related by blood, marriage or adoption. It is important to note that the implementation of this language may vary and social workers, child welfare leaders and decision makers may support guardianship by fictive kin, as a practice or implementation-level policy decision. Nevertheless, it is instructive to see how state policies differ, at least in official pronouncements.

Our analysis also revealed several different approaches to defining relatives. For example, Alabama law does not appear to allow fictive kin guardianship. Its statute – which mirrors those of other states that do not allow it – explicitly defines a relative as someone related by blood, marriage or adoption:

An individual who is legally related to the child by blood, marriage, or adoption within the fourth degree of kinship, including only a brother, sister, uncle, aunt, first cousin, grandparent, great grandparent, great-aunt, great-uncle, great great grandparent, niece, nephew, grandniece, grandnephew, or a stepparent.³⁶

In contrast, as the following two excerpts illustrate, states allowing fictive kin to serve as guardians expand their definitions of who may serve as a guardian:

A “nonrelative extended family member” is defined as an adult caregiver who has an established familial relationship with a relative of the child . . . The parties may include relatives of the child, teachers, medical professionals, clergy, neighbors, and family

³⁶ ALA. CODE § 12-15-301(13) (West 2014).

friends.³⁷

“Kinship foster home” means . . . [t]he substitute may be provided by any of the following: a member of the child’s extended family; a member of the child’s or family’s tribe; the child’s godparents; the child’s stepparents; or a person to whom the child, child’s parents and family ascribe a family relationship and with whom the child has had a significant emotional tie that existed prior to the agency’s involvement with the child or family.³⁸

These expansive definitions may increase the pool of relatives eligible for a subsidized guardianship. In contrast, states with more narrow definitions may limit the number of people who can serve and receive subsidies as guardians. In the process, this can potentially reduce the number of potential guardianships that are established.

E. Additional Criteria

Alongside the eligibility criteria outlined in federal GAP policy, a limited number of states have woven additional criteria into their statutes and regulations. While these provisions are generally not explicitly listed as eligibility requirements, they can be interpreted as preferring some children over others for guardianship. One such preference, found in several state statutes, involves determining guardianship cases for children with “special needs.” Specifically, a limited number of states indicate that children with special needs are eligible for subsidized guardianship. As the following excerpt shows, the Missouri Administrative Code premises guardianship on special needs:

If [it] has [been] determined that the child cannot or should not return home, and the child meets the statutory definition of special needs

³⁷ CAL. WELF. & INST. CODE § 362.7 (West 2014).

³⁸ MONT. CODE ANN. § 52-2-602(4) (West 2015).

with regard to specific factors or conditions . . .³⁹

It is important to note that “special needs” often has multiple meanings in child welfare practice, beyond the sole presence of a disability. Nevertheless, the Missouri statute appears to prefer the use of guardianship with particular children. Alaska follows suit and also uses specific criteria to focus the use of guardianship. Its statute states that the purpose of subsidized adoption and guardianship is to facilitate the placement of a child who has met typical federal eligibility requirements *and* who has been determined to have “special needs” and “who is hard to place.”⁴⁰ The District of Columbia includes different provisions. Specifically, its statutes explain that when deciding whether guardianship is in a child’s best interest, child welfare authorities should give “great weight” to “[e]vidence that drug-related activity continues to exist in a child’s home environment” after social welfare services have been provided.⁴¹

F. Summary

Our analysis of eligibility criteria suggests that states frequently exercise their discretion to develop guardianship policies beyond what is laid out in federal law. Table 1 summarizes the frequency of eligible age, age of input, and fictive kin provisions in state law.

³⁹ MO. CODE REGS. ANN. tit. 13, § 35-38.010(2)(A)(2)(C)(I) (West 2016).

⁴⁰ ALASKA ADMIN. CODE tit. 7, § 53.200(a)(1) (West 2016).

⁴¹ D.C. CODE § 16-2383(d)(5) (West 2016).

Table 1. Eligibility Criteria

Criteria	Number
Eligible Age	
<i>21 with conditions</i>	26
<i>19 with conditions</i>	8
<i>18</i>	14
<i>Other or unspecified age</i>	3
Age of Input About the Guardianship	
<i>14</i>	32
<i>12</i>	8
<i>Unspecified</i>	11
Fictive Kin Eligible for Guardianship	
<i>Yes</i>	41
<i>No</i>	10

We found that overall, state law creates a policy framework that has the potential to bring more children into guardianships than might be the case if all the states solely followed the federally defined requirements for subsidized guardianship. Specifically, many states have extended the maximum age for financial support beyond the guideline age provided in federal GAP legislation. A majority of states have also allowed fictive kin to assume the care of children through guardianship, even though this is not addressed in federal law. At the same time, however, some state statutes include limiting criteria that imply guardianship should be focused on specific groups of children. Taken as a whole, however, the eligibility criteria we examined have the potential to expand the use of guardianship, increase children's sense of connectedness and continuity, and potentially ensure that children remain linked to their cultures and heritage.

IV. State Supports

A. Overview

Based upon the federal law, the primary means for supporting families who become guardians is by providing

financial supports. Federal GAP supports include a monthly maintenance payment as well as a one-time payment of up to \$2,000 to cover non-recurring expenses associated with establishing the guardianship.⁴² However, just as states have discretion to set eligibility requirements, they also have the freedom to adjust the financial supports provided to families. This freedom is exercised by setting the monthly maintenance payment amount and by potentially providing families with additional financial and non-financial forms of support.⁴³ We identified several provisions in state law and policy that directly address the types of supports guardians receive. We focus on three such provisions:

- Monthly subsidy payments to guardians
- Variance in subsidy amount
- Additional social services for children and guardians

B. Monthly Subsidy Payments to Guardians

Federal GAP legislation states that children entering guardianships must have been eligible for foster care maintenance payments for six months to qualify for IV-E support. Once a guardianship is established, the states set the ongoing monthly subsidy amount. However, the Fostering Connections Act requires that the assistance payment “not exceed the foster care maintenance payment which would have been paid on behalf of the child if the child had remained in a foster family home.”⁴⁴ During our review, we

⁴² 42 U.S.C. § 673(d)(1)(B)(iv); Fostering Connections to Success and Increasing Adoptions Act of 2008 §101(b).

⁴³ More specifically, the Fostering Connections Act sets out the “minimum requirements” for kinship guardianship agreements between relatives and states. The Act explicitly indicates that the amount and manner of the payments are to be specified in the agreements made between the state and individual guardians, including “the additional services and assistance that the child and relative guardian will be eligible for under the agreement.” 42 U.S.C. § 673(d)(1)(B)(i)-(ii); Fostering Connections to Success and Increasing Adoptions Act of 2008 § 101(b).

⁴⁴ 42 U.S.C. § 673(d)(2); Fostering Connections to Success and Increasing Adoptions Act of 2008 § 101(b).

found that the states vary widely in whether they identify the subsidy amount in their statutes. Frequently, this information can be found only in practice or policy manuals. As a result, we were not always able to determine the payment rate from our research.

Based upon the data we did find, we determined that a majority of states (thirty-five states) set the monthly subsidy payment equal to 100 percent of the foster care payment and four states set the payment rate below 100 percent. The following excerpt from the Louisiana Administrative Code exemplifies the language states use to set the subsidy rate.

The amount of payment shall not exceed 80 percent of the state's regular foster care board rate based on the monthly flat rate payments of the regular foster care board rate for the corresponding age group.⁴⁵

It should be noted that eight states were silent on the issue and three states equate the subsidy to another amount. For example, Texas equates the subsidy amount to the adoption assistance payment.⁴⁶

C. Variance in Subsidy Amount

Federal law allows families to be reimbursed for up to \$2,000 of non-recurring expenses related to establishing the guardianship. We were interested in determining whether states have explicit statutory or policy provisions that suggest guardians can be reimbursed for additional expenses – whether recurring or not – related to the care of their children. We determined that 28 states have statutory or policy language that appears to provide for reimbursement for expenses other than a monthly stipend.

While we found that statutes and codes sometimes give clues as to the level of support that states provide guardians, the specific amount of subsidy and the types of additional support are negotiated between the relative and the

⁴⁵ LA. ADMIN. CODE tit. 67, pt. V, § 4101(B)(1) (West 2016).

⁴⁶ TEX. FAM. CODE ANN. § 264.854 (West 2009).

state through the guardianship agreement process. And even when additional supports are provided for in the final guardianship agreement, guardians may be asked to access private insurance or other public welfare benefits before securing assistance through additional guardianship support funds. We are also cognizant that while statutes and policies might authorize the provision of additional financial supports, whether these supports are funded and delivered is another matter. Yet, even an unfunded statutory or policy authorization reveals something about the legal framework and political culture surrounding guardianship in an individual state. The variation in legal language we found among the states underscores that they make markedly different choices when confronted with the same social welfare issue.

Our research shows that additional payments, when they are included in statutes and policies, appear intended to facilitate placement permanence and stability. For example, Ohio, a state that does not have subsidized guardianship but does make payments to guardians of children diverted from foster care, makes this goal explicit in its Administrative Code:

Eligible kinship caregiver(s) shall receive a one-time payment to defray costs of placement and may receive subsequent payments at six-month intervals to support the stability of the child's placement in the home.⁴⁷

Similarly, Illinois indicates that additional funds may be provided to help promote a child's physical, emotional and mental health, provided the child is not covered through some other public welfare program:

A child meeting the eligibility criteria for subsidized guardianship entitled to the types of assistance outlined in subsections (e)(1), (2) and (3) may also apply for the following types of assistance: Physical, emotional and mental

⁴⁷ OHIO ADMIN. CODE § 5101:2-40-04(C) (West 2015).

health needs not payable through insurance or public resources (e.g., other State or community funded programs) that are associated with, or result from, a condition whose onset has been established as occurring prior to the transfer of guardianship.⁴⁸

Overall, our review indicates that there is the potential for guardians to receive additional financial support — within a state program’s resources and guidelines — that exceed the support provided for in federal GAP law.

D. Additional Services for Children and Guardians

Children in guardianships in 34 states may receive social and mental health services beyond Medicaid insurance, if the state agrees to provide such assistance when negotiating the guardianship agreement with the relative caregiver. These additional services may include family support assistance and counseling. Some state statutes and regulations specifically identify the additional programs that are available to children and their guardians, while other states’ statutes are less clear. The following excerpts from Florida and Ohio refer to programs available to kinship caregivers who are not necessarily guardians (while also making it clear that access to the programs is contingent upon available state funding):

Within available funding, the Relative Caregiver Program shall provide caregivers with family support and preservation services, flexible funds[,] . . . school readiness, and other available services in order to support the child’s safety, growth, and healthy development.⁴⁹

Within available funds, the department of job and family services shall make payments to public children services agencies for the purpose of permitting the agencies to provide

⁴⁸ ILL. ADMIN. CODE tit. 89, § 302.410(e)(4) (West 2016).

⁴⁹ FLA. STAT. ANN. § 39.5085(2)(f) (West 2016).

kinship care navigator information and referral services and assistance obtaining support services to kinship caregivers pursuant to the kinship care navigator program.⁵⁰

Meanwhile, Hawaii's statute considers the negotiation of access to additional support programs during the time that a guardianship is being established. This is a practice similar to Hawaii's treatment of terms regarding monthly financial support:

The agreement shall: . . . (2) Specify the additional services and assistance that the child and legal guardian will be eligible for under the agreement; (3) Describe the procedure by which the legal guardian may apply for additional services as needed . . .⁵¹

E. Summary

Our review of policies describing financial and program supports to guardians shows that many states will consider funding a greater package of assistance than is minimally called for in federal law. These major provisions, accessible not only to guardians but also to others who are eligible for specified additional payments, are summarized in Table 2.

⁵⁰ OHIO REV. CODE ANN. § 5101.852 (West 2001).

⁵¹ HAW. ADMIN. R. § 17-1621-10(a) (LexisNexis 2010).

Table 2. State Supports

Type of Support	Number
Monthly Subsidy Payment	
<i>100% Foster Care Payment</i>	35
<i><100% Foster Care Payment</i>	4
<i>Equal to the Adoption Subsidy</i>	4
<i>Not addressed</i>	8
Additional Financial Supports to Guardians	
<i>Yes</i>	28
<i>Not addressed</i>	23
Additional Services in Support of Guardianship	
<i>Yes</i>	34
<i>Not addressed</i>	17

In most states, guardians are eligible for the same level of financial support that foster parents receive and, depending on a child's needs, may qualify for additional financial or programmatic assistance. These supports distinguish guardianship from adoption, where adoptive parents are principally responsible for providing for their children (unless adoption assistance is negotiated). In addition, while state policies provide for guardianship assistance, the policies consistently indicate that additional assistance is contingent upon the availability of funds. Thus, a child might qualify for additional support when the guardianship is established, but the level of support or access may diminish over time depending upon a state's financial situation. This ongoing conditional status of additional support underscores guardianship's unique permanency status as contingent upon both the state and guardian's financial ability to provide for children and distinguishes it from adoption, where parents are ultimately solely financially responsible for their children.

V. Post-Guardianship Management

A. Overview

Our analysis revealed that after a guardianship is established, the states often maintain an ongoing, albeit attenuated, relationship with the guardian and may continue to monitor children while they live in the guardian's home. This level of monitoring is undoubtedly less intense than that of the supervision that takes place for a child in foster care. However, because guardians continue to receive financial support from the state, they must maintain an ongoing relationship with the state. This ongoing monitoring distinguishes the permanency associated with guardianship from that of adoption or reunification. However, as long as the states that use IV-E funds do not violate federal eligibility criteria, they appear to have a high degree of freedom to shape the nature of this post-guardianship relationship.

To better understand the varying nature of the state's ongoing, post-guardianship role across the country, we explored three issues in statutes and regulations that will be addressed in the following sections:

- Frequency of case review after guardianship is established
- Dependency case status after guardianship is established
- Naming of successor if a guardian dies or cannot continue

B. Case Review after Guardianship is Established

A majority of the state statutes (32 states) explicitly reference the need for regular review of guardianships. However, this review might be as minimal as an annual report to the court or child welfare agency to ensure that the child maintains residence in the guardian's home. Some states make clear that the case review helps to evaluate the ongoing need for financial subsidy. For example, the District of Columbia code indicates that as part of the annual review,

“the need for continuing each permanent guardianship subsidy” shall be determined.⁵² Similarly, Idaho requires “a mandatory annual evaluation of the need for continued assistance and the amount of the assistance.”⁵³

At the same time, state statutes vary in how fully they describe the review process. Most states, like Arkansas, simply require completion of a brief report and survey:

An annual progress report and review of the subsidized guardianship agreement are required annually in order for the subsidized guardianship and subsidized guardianship payments of any amount or payment rate to continue.⁵⁴

Others, including Ohio and Alabama, appear to have more elaborate procedures, including face-to-face contact with a representative or the possibility of a review hearing:

... Conducting a face-to-face interview with the kinship caregiver(s) to determine eligibility no less frequently than annually.⁵⁵

Within 12 months of the date a child is removed from the home and placed in out-of-home care, and not less frequently than every 12 months thereafter during the continuation of the child in out-of-home care, the juvenile court shall hold a permanency hearing.⁵⁶

Overall, states customize review procedures to meet their unique needs, with some choosing processes that are relatively effortless and other states potentially imposing heavier burdens on guardians. In general, provisions regarding guardianship reviews distinguish this form of permanency from adoption and reunification where, ultimately, the state does not maintain an ongoing presence in

⁵² D.C. CODE § 16-2399(f) (West 2016).

⁵³ IDAHO ADMIN. CODE r. § 16.06.01.702(04)(f) (West 2016).

⁵⁴ 016-15 ARK. CODE R. § 011 (LexisNexis 2016).

⁵⁵ OHIO ADMIN. CODE § 5101:2-40-04(G)(8) (West 2001).

⁵⁶ ALA. CODE § 12-15-315(a)-(d) (West 2014).

the parent/child relationship. This ongoing review diminishes the zone of privacy around a family involved in a guardianship when compared to that of adoption or permanent reunification.

C. Dependency Case Status after Guardianship is Established

States appear to vary in their handling of the underlying dependency case once a guardianship has been established. We found evidence that at least thirteen states appear to close the dependency case. In Oregon, for example, a guardianship order terminates the department's "care or custody" of the child and an order is entered "relieving the Department of responsibility for the care, placement, and supervision of the child."⁵⁷ Similarly, in Nebraska, the case is dismissed "following the court hearing finalizing the guardianship."⁵⁸ In Washington, the dependency case is closed and a guardianship case is opened.⁵⁹ However, in Washington, guardianship cases are also governed by dependency law and the Juvenile Court. While some states close the dependency case, it is not always clear how the case is then managed by the Court. Vermont appears to be atypical, in that it explicitly addresses this issue. Its statute calls for the transfer of the case to family court:

(c) After the Family Division of the Superior Court issues a final order establishing permanent guardianship, the case shall be transferred to the appropriate Probate Division of the Superior Court in the district in which the permanent guardian resides. Jurisdiction shall continue to lie in the Probate Division. Appeal of any decision by the Probate Division of the Superior Court shall be de novo to the

⁵⁷ OR. ADMIN. R. 413-070-0959 (West 2016).

⁵⁸ *Legal Guardianship Guidebook*, NEB. DEP'T OF HEALTH & HUMAN SERV. 5 (2012), http://dhhs.ne.gov/children_family_services/Guidebooks/Legal%20Guardianship%20Guidebook.pdf.

⁵⁹ WASH. REV. CODE ANN. § 13.36.040(4) (West 2016).

Family Division.⁶⁰

D. Successor Guardianship

In adoption and reunification, children's parents are responsible for indicating who will take custody of their children in the event of their deaths. Determining who will replace a guardian in the case of death or disability is a much more complicated matter. This is because successor guardianship often necessitates that the successor meet state requirements, including licensure, and maintain a relationship with the state to ensure subsidy transfer and continuance of guardianship eligibility.⁶¹ We found that at least fifteen states allow a successor guardian to be identified in the guardianship agreement or appointed by the court if a guardian dies or is no longer able to continue in their role without ending the guardianship. As the following excerpts illustrate, appointing successors is variously described in law and policy:

In the case of the death, severe disability or serious illness of a caregiver who is receiving a guardianship subsidy, the commissioner may transfer the guardianship subsidy to a successor guardian . . . [if] such successor guardian [has been identified] in the subsidy agreement and any addendum thereto. . .⁶²

If a permanent guardian appointed pursuant to § 8-872 is unable or unwilling to continue to serve as permanent guardian, the permanent guardian, the division or an interested party

⁶⁰ VT. STAT. ANN. tit. 14, § 2664(c) (West 2014).

⁶¹ The legal process for naming a successor was made easier by federal legislation in 2014 that states eligibility for GAP support is not affected by replacement of a guardian by a successor. Specifically, the Fostering Connections Act now includes the following section: "In the event of the death or incapacity of the relative guardian, the eligibility of a child for a kinship guardianship assistance payment under this subsection shall not be affected by reason of the replacement of the relative guardian with a successor legal guardian named in the kinship guardianship assistance agreement . . ." 42 U.S.C. § 673(d)(3)(C).

⁶² CONN. GEN. STAT. ANN. § 17a-126(i) (West 1998).

may file a motion for appointment of a successor permanent guardian.⁶³

The Maryland administrative code reflects a contrasting approach. It makes clear that guardianship ends if “the child or relative guardian dies” and that guardianship assistance cannot be transferred to a relative unless the relative is “party to both the guardianship assistance agreement and the applicable decree of custody and guardianship.”⁶⁴

E. Summary

Our analysis underscores the ways that guardianship is different from both adoption (when un-subsidized) and foster care. In particular, guardians maintain an ongoing reporting relationship with the state that provides them the subsidy.⁶⁵ The frequency of this finding and others are summarized in Table 3.

⁶³ ARIZ. REV. STAT. ANN. § 8-874(A) (2008).

⁶⁴ MD. CODE REGS. 07.02.29.13(A)(5), (C) (West 2016).

⁶⁵ It should be noted that while adoptive parents who receive an adoption subsidy may also have reporting obligations, they nevertheless hold a very different legal status from guardians when interacting with child welfare authorities. Namely, this is because they are in possession of full parental rights while guardians are not.

Table 3. Post-Guardianship Management

Post-Guardianship Provisions	Number
Regular Review of the Guardianship	
<i>Yes</i>	32
<i>Not addressed</i>	19
Dependency Case Status	
<i>Closed</i>	13
<i>Not addressed</i>	38
Successor Provisions	
<i>Yes</i>	15
<i>No</i>	36

We found that the level of surveillance applicable to the ongoing reporting relationship varies across the states. Some states simply require the guardian to complete a yearly survey, while others leave open the possibility of an in-person meeting or review hearing. Nevertheless, the intensity of the state-guardian relationship is certainly different from that of a relationship between state and foster parent. For a foster parent, a child's placement and the foster parent's care of the child are subject to frequent oversight and review during home visits and court hearings.

We found other suggestions that guardianships are a unique form of placement, legally distinct from foster care and adoption/reunification. For example, at least thirteen states close the underlying dependency case once a guardianship is established. Thus, in these states, children under a guardian's care are no longer formally involved with the child welfare system. In contrast, only thirteen states legally allow guardians – unlike parents – to identify a potential successor in the event of their death. Altogether, these findings reinforce the idea that guardianship is a unique legal status that possesses some of the permanency attributes of adoption while also mirroring some of the features of foster

care.

VI. Parental Relationship

A. Overview

Perhaps the factor that most distinguishes the legal nature of guardianships from other permanent resolutions to dependency cases is the ongoing residual relationship between children and their parents after a guardianship is established. Because of the significance of parental rights, we were interested in exploring this issue more fully in our analysis. Specifically, we focused on four issues that are addressed in state law and policy, which we address in the following sections:

- Termination of parental rights
- Parent visitation during guardianship
- Reunification with parents after establishing guardianship
- Parents' child support responsibility during guardianship

B. Termination of Parental Rights

It is generally understood that a parent's rights do not need to be terminated in order to establish a guardianship. In fact, the absence of the need to terminate parental rights may be one of the primary benefits of guardianship. Nevertheless, we were curious about this issue and how it is addressed in state law. Our analysis revealed that none of the states make guardianship contingent upon the termination of parent's rights. While both Idaho and Alaska explicitly indicate that termination may make a child eligible for guardianship, this situation is not a necessity for establishing a guardianship.⁶⁶ In fact, state statutes and policies – such as those in Maryland and West Virginia – reinforce the idea that guardianship does

⁶⁶ See, e.g., IDAHO ADMIN. CODE r. § 16.06.01.704(.01)(b) (West 2016); ALASKA ADMIN. CODE tit. 7, § 53.245(b)(3) (West 2016).

not affect fundamental parental rights. Typical provisions affirming the ongoing nature of parental rights include the following:

The written notification [of guardianship] shall contain information that their parental rights are not being terminated and that parents or any other party in the case may petition the court to review the custody and guardianship order at any time in the future.⁶⁷

A legal guardianship subsidy may not require the surrender or termination of parental rights.⁶⁸

New Jersey's statute offers a commonly-held view of the nature of the underlying parental relationship:

... kinship legal guardianship ... is intended to be permanent and self-sustaining, as evidenced by the transfer to the caregiver of certain parental rights, but retains the birth parents' rights to consent to adoption, the obligation to pay child support, and the parents' right to have some ongoing contact with the child.⁶⁹

Overall, our review indicates that states explicitly reinforce the idea that guardianship is independent of parental rights and that it can be entered into without terminating these rights.

C. Parent Visitation During Guardianship

Given that parents retain their underlying rights to their children following guardianship, it is perhaps not surprising that 28 states address parental visitation in their statutes and policies. The language surrounding visitation varies. A number of states indicate that the terms of visitation

⁶⁷ MD. CODE REGS. 07.02.29.08(D)(1) (West 2016).

⁶⁸ W. VA. CODE § 49-4-112(a) (West 2016).

⁶⁹ N.J. STAT. ANN. § 3B:12A-1(b) (West 2001).

should be set out in guardianship agreements but do not specify these terms. For example, Georgia only requires that the visitation schedule be “reasonable”:

Permanent guardianship orders . . . [e]stablish a reasonable visitation schedule which allows the child and parents adjudicated as a dependent child to maintain meaningful contact with his or her parents through personal visits, telephone calls, letters, or other forms of communication or specifically include any restriction on a parent’s right to visitation.⁷⁰

Mississippi goes somewhat further, indicating that parents may have active roles in their children’s lives and that the terms of contact should be articulated in the home study leading to a guardianship:

Willingness to Work with Birth Parents . . . The [guardianship] applicant’s ability to support the involvement of the child’s parents and other relatives and willingness to maintain permanent connections regardless of the permanency plan should be thoroughly discussed and documented in the home study.⁷¹

It is interesting to note that states take differing approaches to how the visitation schedule should be determined. While Mississippi requires that the issue be addressed in the home study, Pennsylvania delegates decisions about parental visitation to the same court that handles family law issues relating to divorce and child custody:

The court shall refer issues related to support and continuing visitation by the parent to the

⁷⁰ GA. CODE ANN. § 15-11-242(a) (West 2016).

⁷¹ *Policy Manual, Section F: Licensure Policy*, DIV. OF FAMILY & CHILDREN’S SERVS., MISS. DEP’T OF HUMAN SERVS. 29 (2016), <http://www.mdhs.state.ms.us/media/350777/DFCS-Policy-Section-F-05-24-16-Effective-06-23-16-.pdf>.

section of the court of common pleas that regularly determines support and visitation.⁷²

Once a guardianship is entered into – and, presumably, the visitation terms are agreed upon – some states make clear that parents can bring legal actions to modify these terms at a later date. For example, Maine succinctly states that “A parent . . . may petition the court to determine rights of contact[.]”⁷³ Similarly, Delaware affirms that a parent may seek enforcement of “contact, visitation or information” provisions contained in a guardianship agreement.⁷⁴

D. Parents’ Child Support Responsibility During Guardianship

At the same time that parents have a right to visit their children during guardianships, they also have continuing responsibilities to them. During our analysis we found frequent references to a parent’s ongoing liability for child support as a legal financial obligation. States make clear that this obligation is legally distinct from the subsidy payment to guardians. In other words, it appears that parents do not owe the *guardians’* child support, but instead, that they must pay support to the *state* (presumably, as a reimbursement for the monthly subsidy). Specifically, 31 states variously refer to a parent’s ongoing child support duties. Connecticut includes language in their code that illustrates this:

Annually, the subsidized guardian shall submit to the commissioner a sworn statement that the child is still living with and receiving support from the guardian. The parent of any child receiving assistance through the subsidized guardianship program shall remain liable for the support of the child as required by the general statutes.⁷⁵

⁷² 42 PA. CONS. STAT. § 6351(a)(2.1) (West 2016).

⁷³ ME. REV. STAT. tit. 22, § 4038-C(3) (West 2011).

⁷⁴ DEL. CODE ANN. tit. 13, § 2358(a)(1) (West 2016).

⁷⁵ CONN. GEN. STAT. § 17a-126(f)(3) (West 2016).

This policy language underscores the continuing nature of parental responsibilities after guardianship has been established.

E. Reunification with Parents after Establishing Guardianship

The fact that parental rights are not terminated during guardianships – and that, depending upon the state, parents retain their ability to visit their children or have a continuing obligation to pay child support – points to the enduring nature of the parent/child relationship. Nowhere is the lasting basis of parental rights more evident than in statutory and policy language explicitly referencing family reunification after establishment of a guardianship. In fact, legal and policy language in 23 states suggests this possibility. Like other legal procedures pertaining to children, the ultimate standard for determining whether family reunification is appropriate is whether it is in the child's best interest.⁷⁶

Our analysis suggests that parents may bring a legal action to end a guardianship and seek reunification with their children in much the same way a non-custodial parent in a divorced family may seek custody of one's children, possibly years after a divorce is finalized. Such actions may be prompted by an improvement in a parent's circumstances. Support for this notion can be found in policy language from both Oklahoma and New Jersey:

The court may order that reunification services again be provided to the parent or parents if it is in the best interests of the child and may consider the parent or parents for custody of the child, with Department supervision, if the parent can prove by a preponderance of the evidence that conditions which previously existed at the time of the granting of the

⁷⁶ Fred Wulczyn, *Family Reunification*, 14 THE FUTURE OF CHILD, no. 1, 94 (2004). See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

permanent guardianship order have been substantially corrected and that reunification is the best alternative for the child.⁷⁷

An order or judgment awarding kinship legal guardianship may be vacated by the court prior to the child's 18th birthday if the court finds that the kinship legal guardianship is no longer in the best interests of the child or . . . the court finds that the parental incapacity or inability to care for the child that led to the original award of kinship legal guardianship is no longer the case and termination of kinship legal guardianship is in the child's best interests.⁷⁸

Iowa's statute, while allowing for return home, indicates that such actions may only be brought every six months and for good cause:

The following persons shall be authorized to file a motion to terminate, modify or vacate and substitute a dispositional order: . . . The child's parent, guardian or custodian, except that such motion may be filed by that person not more often than once every six months except with leave of court for good cause shown.⁷⁹

While the potential for reunification is generally common across the states, it is not universal. The statutes of at least three states – Vermont, Washington and Delaware – indicate that although a guardianship might be set aside, parents may not automatically become eligible to be reunified with their children when a guardianship ends. Vermont's statute explicitly states that parents have no right to seek termination of the guardianship order after the court has issued the final order.⁸⁰ In Washington, if a guardianship is

⁷⁷ OKLA. STAT. tit. 10A, § 1-4-711(B)(5) (West 2016).

⁷⁸ N.J. STAT. ANN. § 3B:12A-6(f) (West 2001).

⁷⁹ IOWA CODE § 232.103(2) (West 2008).

⁸⁰ VT. STAT. ANN. tit. 14, § 2663(b) (West 2015).

terminated, children remain dependents and parents revert to the legal status they had while their children were in foster care and the parents were parties to the dependency action.⁸¹ Similarly, according to Delaware law, once a guardianship is rescinded, the parents have no greater rights to their children than other parties involved in the dependency action:

A parent may not petition the Court to rescind a permanent guardianship once granted under this chapter Where the permanent guardianship is rescinded by the Court . . . the parent shall be considered with no greater priority than any other person or agency⁸²

Because the overwhelming majority of state laws and policies clearly leave open the possibility of reunification, this reinforces the idea that guardianship is a different form of permanency from either adoption or reunification.

F. Summary

Guardianship is a complicated legal status that vests the care and legal custody of children with relatives, but which does not transfer all parental rights and responsibilities to the guardian. Our review of state law and policy revealed a variety of provisions, which reinforce the enduring nature of the parent/child relationship, even after a guardianship is established. The frequency of these provisions is summarized in Table 4.

⁸¹ WASH. REV. CODE ANN. § 13.34.233(4) (West 2016).

⁸² DEL. CODE ANN. tit. 13, § 2359(c)(2)-(3) (West 2016).

Table 4. Parental Relationship

Provisions Concerning Parental Rights	Number
Parent Visitation Permitted	
<i>Yes</i>	28
<i>Not addressed</i>	23
Child Support Required of Parent	
<i>Yes</i>	31
<i>Not addressed</i>	20
Reunification Allowed	
<i>Yes</i>	23
<i>Not addressed</i>	28

Specifically, we found that none of the states require parental rights be terminated before entering into a guardianship. In fact, not only do several state policies allow for ongoing visitation between parents and children, but they also indicate that parents may actually be responsible for paying child support to the state. Just as important, a number of states specifically allow parents to seek reunification in the event that parental circumstances change or that the parent desires to revisit the arrangement. These findings underscore the unique legal status of guardians, and the ways guardianship differs from adoption and reunification.

VII. Study Limitations

The study's primary goal was to identify the criteria that states use to guide and structure their guardianship programs at a particular moment in time. This was accomplished by analyzing a variety of state statutes, regulations, policy documents, and previous legal research pertaining to subsidized guardianship. Consequently, our focus was, by necessity, narrow. Specifically, our study examined 91 different policy sources (listed in Appendix B) that were current as of the fall of 2015. These laws and

policies are implemented by child welfare workers and court personnel in thousands of kinship and guardianship cases every year. However, the ways in which these policies are implemented is outside the focus of our research. And we acknowledge that additional, but not publicly available, policy materials and procedures may steer implementation of the guardianship policies we cite. Consequently, our findings cannot be generalized to the ways that laws and policies we examined are actually implemented in practice.

VIII. Conclusion

This study of state guardianship statutes and regulations was guided by a desire to understand how individual states were supporting – or not supporting – guardianship placements in law. We analyzed state statutes and administrative codes pertaining to guardianship, including those of both states that use federal IV-E money to fund guardianship and those that do not. Beginning with an analysis of the federal GAP legislation, we looked for both alignments and divergences between state and federal law. In order to use IV-E money for guardianship subsidies, states must follow the general parameters of federal legislation. However, there are areas where they can exercise their discretion and either expand or narrow their individual guardianship and funded kinship care provider programs. We found four domains in which states did this:

- Eligibility criteria for guardianship
- Supports to families – both financial and services
- Post guardianship management and reporting
- Parental rights and responsibilities

Our findings in these four areas make clear that states have used their discretion to create diverse legal frameworks to support guardianships in their jurisdictions. The result is a varied –and, at times conflicting – body of state guardianship laws. While state laws differ from one another, several

important trends emerged from our research. First, it appears that, as a whole, some states have sought to make guardianship appealing to families by setting relatively expansive eligibility criteria, at least when compared to those identified in the Fostering Connections Act. Specifically, in comparison to federal guidelines, a number of states have extended the maximum age for receiving a subsidy. In addition, several states have statutory and policy language that enables families to have potential opportunities to receive financial and social service supports beyond monthly subsidy payments. Clearly, these findings show that states vary in how they approach child welfare guardianship.

Similarly, states vary in how they manage their relationships with guardians and how parental rights are impacted by guardianships. Our findings indicate that many states maintain an ongoing reporting relationship with guardians receiving subsidies, although the nature of these reports ranges from completion of an annual survey to participation in court hearings. Regardless, our research suggests that guardianship requires some form of ongoing state presence in the child/caregiver relationship. A child's parents also retain rights and responsibilities regarding their child following the child's entry into a guardianship. Thus, our findings underscore the status of the guardianship as a unique legal form of permanency, since the termination of parental rights is not required and biological parents retain the right to seek termination of the guardianship. While guardianships provide stability, laws in several states suggest that parents may be able to bring actions to set aside the guardianship following resolution of their troubles. And just like with other provisions, there is considerable variation among the states in how they handle parental rights following guardianship.

Taken together, our research findings reveal a patchwork of guardianship laws across the states. A comparison of our findings to the subsidized guardianship legislation suggests that additional research might be needed to better understand how legislation can better support children and guardians. For example, an outcome analysis of

state data that includes these key policy variations in multivariate statistical modeling, could be an important next step. Altogether, our work suggests that the states are positively inclined toward guardianship and are creating legal frameworks to strengthen it. At the same time, the states must continue to grapple with the enduring nature of birth parents' rights, and continue to seek ways of balancing those parental rights with the interest of children's stability and the rights of guardians.

IX. Appendix

Federal Eligibility Criteria for Guardianship Assistance Child Eligibility

(§ 473(d)(3); P.L. 110-351, § 101(b); ACYF-CB-PI-10-01; ACYF-CB-PI-10-11)

- The child has been removed from his or her family's home pursuant to a voluntary placement agreement or as a result of a judicial determination that allowing the child to remain in the home would be contrary to the child's welfare.
- The child is eligible for federal foster care maintenance payments under Title IV-E of the Social Security Act for at least six consecutive months while residing in the home of the prospective relative guardian who was licensed or approved as meeting the licensure requirements as a foster family home.
- Return home or adoption is not appropriate permanency options for the child.
- The child demonstrates a strong attachment to the prospective relative guardian and the relative guardian has a strong commitment to caring permanently for the child.
- If the child is age 14 or older, the child must be consulted regarding the guardianship arrangement.
- Eligibility may not be limited due to the age of a child under 18 years old or to a child's special needs.

Sibling Eligibility

(§ 473(d)(3)(B); P.L. 110-351, § 101(b); ACYF-CB-PI-08-007; ACYF-CB-PI-10-11)

Siblings of a GAP eligible child may be placed in the same relative guardianship arrangement if the department and the relative agree on the appropriateness of the arrangement for the siblings, even if the siblings do not meet the eligibility requirements for kinship guardianship assistance payments listed above. Federally supported guardianship assistance payments may be made on behalf of each sibling so placed.

Guardian's Eligibility

(§ 471(a)(20)(D); 473(d); P.L. 110-351, §§ 101(b) & (c)(2)(A); ACYF-CB-PI-08-007; ACYF-CB-PI-10-11)

- The guardian is the eligible child's relative.
- The guardian is a licensed foster parent and approved for guardianship assistance by the department after the guardian has undergone fingerprint-based criminal record checks and child abuse and neglect registry checks and all adults in the guardian's home have undergone child abuse and neglect registry checks;
- The eligible child has resided with the prospective relative guardian in the prospective guardian's residence for at least six months;
- The guardian has a strong commitment to caring permanently for the child; and
- The guardian has obtained legal guardianship of the child after the guardianship assistance agreement has

been negotiated and finalized with the department.

X. Appendix: Statutes, Codes and Policies Analyzed

Ala. Code Ann. § 12-15-314, 315

Ala. Code Ann. § 38-12-2

Alaska Admin. Code tit. 7, § 53.226, 245, 249 and 299

Ariz. Rev. Stat. § 8-514, § 8-814, § 8-871, 872

Ark. Div. of Children & Fam. Services, Policy & Procedure Manual, Policy VIII-L

Ark. Code Ann. § 9-8-204, § 9-8-206, § 9-27-355

Cal. Welf. & Inst. Code § 11363, § 11364, § 11386, § 11391

12 Colo. Code Regs. § 2509-4

Conn. Gen. Stat. § 17a-101, 114, 126

Del. Code Ann. tit. 13, § 2353, § 2358, § 2359

D.C. Code § 16-2383, § 16-2388 - § 16-2391

D.C. Code § 4-3101.02

Fla. Admin. Code Ann. r. 65C-28, 30

Fla. Stat. § 39.5085(2)(d)

Ga. Code Ann. § 15-11

Ga. Code Ann. § 29-2-21(8)(A)

Haw. Code R. § 17-1610, § 17-1617, § 17-1621, § 17-1711

Idaho Admin. Code r. 16.06.01.702-704

Ill. Admin. Code tit. 89, § 302.410

465 Ind. Admin. Code 2-8-2, 3, 5, 6, 9

465 Ind. Admin. Code 3-1-9

Ind. Code § 31-34-15, § 31-34-21
Ind. Code § 29-3-8-9(a)(2)
Iowa Admin. Code r. 441-204
Iowa Code § 232.103(2)(b)
Iowa Dep't of Human Servs., Employees' Manual, Title 13, Guardianship Subsidy
Kan. Stat. Ann. § 620.027
Kan. Stat. Ann. § 38-2202
Kan. Dep't for Children & Families, PPS Policy & Procedure Manual, § 6112(C)
Ky. Rev. Stat. Ann. § 600.020(8)
Ky. Rev. Stat. Ann. § 620.027
405 Ky. Admin. Regs. 1:130
La. Admin. Code tit. 67, § 4101
Me. Stat. tit. 22, § 4038-C, D
Md. Code Regs. 07.02.29
Md. Guardianship Assistance Program, Policy SSA #11-21
Me. Child & Fam. Servs. Policy, IX: Permanency Guardianship
110 Mass. Code Regs. 7.303
Mich. Comp. Laws Ann. § 722.872-876
Minn. Stat. § 256N.02
Minn. Stat. § 256N.21-28
Miss. Code Ann. § 43-15-13, 17
Miss. Dep't of Human Servs., Section F: Licensure Policy
Mo. Code Regs. tit. 35, § 38.010, § 38.021
Mo. Rev. Stat. § 453.074(1)(5)

Mont. Admin. R. 37.50.1101-.1103
Mont. Code Ann. § 41-3-444
Mont. Child & Fam. Servs. Policy Manual:
Substitute Care for Children: Guardianship
Neb. Div. of Children & Fam. Services Admin.
Memo #5-2011
Neb. Legal Guardianship Guidebook
Neb. Rev. Stat. § 71-1904(2)
Nev. Rev. Stat. § 432B.623, .624
Nev. Kinship Care Policy Manual
N.H. Protocols Relative to Abuse & Neglect
Cases, Ch. 10, Protocol 2
N.H. Protocols Relative to Abuse & Neglect
Cases, Ch. 11, Protocol 7
N.J. Rev. Stat. § 3B:12A-1
N.J. Admin. Code § 10:90-19.6(a)
N.J. Dep't of Children & Fam. Policy Manual
N.M. Stat. Ann. § 40-10B
N.Y. Soc. Serv. Law § 458a-f
N.Y. 18 NYCRR Pt. 436
N.C. Dep't of Health & Human Servs. Manual,
1201(E)(3)
N.D. Children & Fam. Servs., Service Ch., §
623-10-05, -15, -20
Ohio Admin. Code § 5101:2-40-04
Ohio Admin. Code § 5101:2-42-18(A), (B)
Okla. Stat. tit. 10A, § 1-4-709, -710
Okla. Admin. Code § 340:75-7-24(b)
Or. Dep't of Human Services Policy #I-
E.3.6.2, 413-070

42 Pa. Cons. Stat. § 6351

Pa. Permanent Legal Custodian Policy

R.I. Dep't of Children, Youth & Families
Policy 700.0245

R.I. Dep't of Children, Youth & Families
Policy 900.0025

S.C. Human Servs. Policy & Procedures
Manual, Ch. 8, § 813

S.D. Child Protection Servs. Procedures
Manual

Tenn., Admin. Policies & Procedures: 15.15,
Subsidized Permanent Guardianship

Tenn. Code Ann. § 37-1, 2

Tex. Child Protective Servs. Handbook §
4710-§ 4712

Tex. Fam. Code Ann. § 264.852 - .854

Utah Admin. Code r. 512-500

Utah Code Ann. § 78A-6-1106(1)

Vt. Stat. Ann. tit. 14, § 2663, 2664

Va. Dep't of Soc. Servs.: Child & Fam. Servs.
Manual, 1.6 - 1.7

Va. Code Ann. § 63.2-900.1

Wash. Rev. Code § 13.36.040

Wash. Rev. Code § 13.34.233

Wash. State Dept. of Soc. & Health Servs.,
Practices & Procedures Guide, 43401

W. Va. Dep't of Health & Human Resources,
Legal Guardianship Policy

W. Va. Code § 49-2-17

W. Va. Code § 49-4-112(b)(5)

Wis. Stat. § 48.623

Wyo. Stat. Ann. § 20-5-109, -309