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Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning

SUSAN VIVIAN MANGOLD†

INTRODUCTION

While parents have a right to raise their children free from state intervention, children have a countervailing right to protection from abuse and neglect. If the allegations of abuse and neglect are severe enough, federal and state laws aimed at protecting children require that they be removed from their parents and placed in foster care. Foster care is an entitlement, and every state is required by state and federal law to provide foster care for eligible children. Foster care provides out-of-home care for approximately 500,000 children in the U.S. every day. Most of these children are in foster care as a result of allegations of abuse and neglect against their parents.

At the age of eighteen or twenty-one, the right to protection is superseded by a right of empowerment as children mature out of the system whether they are ready for independence or not. Foster care ends when children

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1. See infra Part II.
4. See id. at 790.
reach the age of majority, eighteen or twenty-one, depending on state law and regulations. In 1999, Congress estimated that 20,000 teens exited foster care because they "aged-out" of the system, reaching the age at which eligibility for foster care benefits is terminated.

The right to protection frames the entire child welfare system and much of the state laws governing the state systems, but it is not clearly recognized under constitutional law. The right is strongest at the front end of the foster care system after cases are investigated and initial placements are developed. In making early placement decisions, non-exclusive parenting is the framework in the allocation of parental rights. Parental rights are shared by a child's biological parents, the state as parens patriae and the foster parents who provide day-to-day care for the child under contract with a public or private agency. The more cooperative the arrangement, using kinship care or foster parents willing to assist the biological parents to regain custody, the more ideal the outset. "Preparing young people in out-of-home care for independent living and for successful adulthood has not been one of the child welfare system's primary goals.".

6. See, e.g., WASH. REV. CODE § 13.34.030 (1) (2000) (stating that a child is "any individual under the age of eighteen years."); HAW. REV. STAT. § 346-17.4 (a) (1) (1999) (stating that a child is eligible for foster care if "[t]he person is twenty-one years or younger.").

7. H.R. 3443, 106th Cong., 1999. As a result of the Foster Care Independence Act, discussed infra Part III, states may now continue some benefits to age 21 and receive federal reimbursement for those foster care benefits.

8. See Deshaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1982) (discussed infra Part I, deciding that the state does not owe a duty to protect a child from violence at least until the child is in state custody).

9. The notion of alternatives to exclusive parenting for stepchildren, children of unwed fathers, and foster children was introduced and developed by Katherine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879 (1984). More recently it has been declared that "the notion of exclusivity is alive and well as one of the pillars of the traditional nuclear family." Alison Harvison Young, Reconceiving the Family: Challenging the Paradigm of the Exclusive Family, 6 AM. U. J. GENDER & L. 505, 506 (1998). The work of Martha Fineman emphasizing family function over family form and state support for familial functions highlights the importance of recognizing and reimbursing responsible adults who fulfill caretaking roles. See MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); Martha Albertson Fineman, What Place for Family Privacy?, 67 GEO. WASH. L. REV. 1207 (1999).
placement.

At the back end of the system, children exit foster care when they age out of the foster care system or are discharged from state care. The first option upon exit from foster care is to again make parental rights exclusive. This first option is accomplished by recreating exclusive parenting through reunification of children with their parents or adoption, but ongoing shared parenting is not a goal. A second option, a fall-back, is to discharge the child to independent living with no parental support. The second option results in children who leave foster care solely because of age. They age out of the system despite the fact that no familial resources are identified for them.

This article challenges two aspects of the foster care system: the shift of rights from protection to empowerment and the construction of parenting arrangements from non-exclusive to exclusive as children move out of foster care. It raises the possibility and argues for the desirability of a third option—a right to protection which is ongoing and non-exclusive parenting as a viable framework upon discharge from care. The third option is necessary to

10. With the passage of the Adoption and Safe Families Act in 1997, the focus has arguably shifted from reunification to adoption in some cases as the preferred goal. See Celeste Pagano, Adoption and Foster Care, 36 HARV. J. ON LEGIS. 242 (1999). Debate is beginning on the propriety of this shift. See, e.g., Naomi R. Cahn, Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L. J. 1189 (1999). This article argues that either reunification or adoption assumes exclusive parenting and that must be challenged to allow non-exclusive parenting options in appropriate cases. But see In re Billy Joe M. and Jason M., 521 S.E.2d 173, 177-78 (W. Va 1999) (holding that following termination of parental rights to free children for adoption, visitation with the biological former parents may be appropriate).

11. It is awkward to argue for an ongoing right to protection when it is perhaps more accurate to recognize that children simply need “ongoing, intimate, hierarchical relationships.” Naomi Cahn & Jana Singer, Adoption, Identity, and the Constitution: The Case for Opening Closed Records, 2 U. PA. J. ON CONST. L. 150, 152 (1999). I use the language of rights to argue against the exclusivity of the right to protection or the right to empowerment while agreeing with Professor Cahn and others that a discussion of rights alone is inadequate to capture the complexity of children’s lives.

12. For a discussion of the “pendulum” swing between policies for reunification or termination as the preferred goal, see Megan M. O’Laughlin, A Theory of Relativity: Kinship Foster Care May be the Key to Stopping The Pendulum of Terminations vs. Reunification, 51 VAND. L. REV. 1427, 1429 (1998). Ms. O’Laughlin argues for kinship for several reasons, including the likelihood that children will maintain relationships with their biological parents. See id. at 1451. Kinship care is an important form of non-exclusive
create permanency plans for older children aging out of foster care that will be more supportive in helping them make safe and successful transitions to adulthood.

This third option draws upon non-exclusive parenting and a child's right to protection to configure parental supports for children aging out of care who cannot benefit from exclusive parenting by being reunified with their families or adopted (first option) and are not ready for successful independent living (second option). It challenges arbitrary age deadlines, recently moved from eighteen to twenty-one by federal law, to create child-centered adult supports for children who would otherwise age out of foster care with no such resources. This article is focusing on creative permanency plans for teen children aging out of foster care. These may not be ideal or even preferable to traditional permanency plans, but they are suggested when all current options are unattainable and the child would otherwise age out due to a birthday and not because the necessary supports are in place to successfully exit care.

Current law allows foster care past age eighteen to age twenty-one in some cases. I am not concerned with establishing an endpoint applicable in all cases. Instead, I am introducing permanency options that would be available to the child, agency and court to use as appropriate until whatever time they are no longer agreed to or approved via judicial or administrative mechanisms. While development of the precise review mechanisms is beyond the scope of this article, I am assuming reviews as are currently in place for foster care for young adults aged eighteen to twenty-one.

In Part I, the theories of non-exclusive parenting and the right to protection are explained and applied to foster children, especially older children in care. I then discuss the parent-child-state balance of rights and responsibilities for children in foster care. I draw on the concept of "non-exclusive parenting" to suggest a broader conception of the custodial rights shared in the parent-child-state-triangle.

In Part II, I briefly summarize the federal law governing the child welfare system prior to 1997. The background on federal initiatives is provided to document the development of the two polar options of exclusive parenting, but it is usually arranged informally or as temporary foster care. It is an option which the author endorses when it takes the form of guardianships or open adoptions as discussed infra Part IV.
parenting or full independence. Reliance on exclusive parenting in permanency planning has resulted in limited familial designs that do not work for all children exiting care. The second option of independence too often merely abandons teens without the supports necessary to succeed.

In Part III, I describe the Adoption and Safe Families Act\(^3\) and the Foster Care Independence Act\(^4\) by highlighting how these two pieces of legislation changed prior law regarding permanency planning. I also discuss the legislative histories to help unravel why changes were deemed necessary. Information on the plight of children who age out of foster care was documented in the legislative histories and illuminates why these laws will not fully meet the needs of older children in foster care. These recent legislative changes still leave a gap of alternatives for older teens.

In Part IV, I first recommend open adoption and secondly guardianship as examples of non-exclusive parenting which need to be permitted and subsidized by the federal government and states for children in foster care. Open adoption and guardianship can create vital familial supports for children who would otherwise remain in foster care and then age out with no familial supports. Thirdly, I develop and support the concept of funded mentors for children for whom other caretaking arrangements are not achieved. Since closed adoption is not an alternative for many and independent living leaves them with no custodial figure, I suggest these three types of non-exclusive parenting arrangements and the legal reforms necessary to make them viable for older teens. I argue that allowing open adoptions, subsidized guardianships and funded mentors would create additional permanency alternatives, vital third options, for children who would otherwise age out of the foster care system.

**PART I: NON-EXCLUSIVE PARENTING AND THE RIGHT TO PROTECTION**

"Rather than seeking to provide adults for children who need them, [current law] seems intent on securing children..."

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for adults who claim them."\textsuperscript{15}

A. Non-Exclusive Parenting in Permanency Planning

Private family law\textsuperscript{16} operates within a framework of exclusive rights, usually triumphing biology over all other considerations.\textsuperscript{17} Private family law allocates the distribution of rights between biological parents in situations of marital dissolution. Even in such disputes, the goal is to develop a custody arrangement which can operate free of state intervention and oversight.\textsuperscript{18}

While third parties, such as grandparents, may seek visitation over the wishes of a parent, especially when they have an ongoing relationship with a child, such infringements on parental control are limited.\textsuperscript{19} Valuing exclusive parenting elevates complete authority over a child above bonding, a child’s wishes and any other considerations that may be relevant to the child-parent relationship.

In developing a theory of non-exclusive parenting, and mindful of the significance attached to parental rights, concerns for parental rights versus psychological attachments have framed the discussion.\textsuperscript{20} For older


\textsuperscript{16} I refer to private family law to describe matrimonial law, domestic relations, and the general doctrinal area governing the allocation of rights and property within families. The state holds no custodial interest in such families.

\textsuperscript{17} Elizabeth Bartholet, *Family Bonds* (1993); Young, supra note 9, at 506 (discussing the notion that family structures are limited to the traditional two-parent model and that parental rights are exclusive rights held by parents alone).

\textsuperscript{18} See, e.g., ARIZ. REV. STAT. § 25-351 (1999); VA. CODE ANN. § 20-124.3 (Michie 1999).

\textsuperscript{19} See Troxel v. Granville, 120 S. Ct. 2054 (2000); Barbara Bennett Woodhouse, *Protecting Children’s Relationships with Extended Family: The Impact of Troxel v. Granville*, 19 CHILD L. PRAC. 65, 70 (2000) (examining the plurality opinion carefully and finding that “the core of the plurality opinion was quite simple and limited: given that parents enjoy constitutional protection of their child-rearing decisions, the state may not intervene without giving ‘some special weight’ to a fit parent’s decision”).

\textsuperscript{20} See Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1979) (developing the concept of continuity of care and the psychological parent); Joseph Goldstein et al., *Before the Best Interests of the Child* (1979) (explaining the importance of parental autonomy and the high standards necessary before intervention into the family can be justified); Bartlett, supra note 9, at 883-86, 902-11, 939-44 (discussing parental rights, psychological
children exiting foster care with no parental resource able to care for them, this polar discussion is irrelevant. Instead of debating exclusive versus non-exclusive parenting, the attention needs to be on implementing and supporting non-exclusive relationships, at least when other more traditional exclusive arrangements are not tenable.\textsuperscript{21}

In contrast, public family law operates under no such illusions of exclusivity. I refer to public family law to describe "cases where the state has intervened into the 'private' family to assume some custodial interest from the parents."\textsuperscript{22} The parent-child-state doctrinal framework assumes a sharing of parental responsibilities among the state, its agents and the parents. The sharing has been challenged by many who argue that the non-exclusivity is not broad enough. These critics argue that "important others" such as grandparents, foster parents, private provider agencies and others should have rights recognized in relation to their responsibility toward the child.\textsuperscript{23} These important others have gained limited legal recognition in sharing the rights and responsibilities of caring for children. For older children, especially those in foster care, the need for a broadened circle of care in the form of non-exclusive parenting is imperative to a successful transition to adulthood.

Non-exclusive parenting defines the foster care system\textsuperscript{24} but has not been used as a way to imagine permanent arrangements for children to safely exit care. In the foster care system, biological parents voluntarily or by order of the court surrender the caretaking responsibilities of their child. The state takes temporary custody of children, but parental rights to visit and make certain formative attachments and foster care as a form of non-exclusive parenting).

\textsuperscript{21.} See Meryl Schwartz, Reinventing Guardianship: Subsidized Guardianship, Foster Care and Child Welfare, 22 N.Y.U. REV. L & SOC. CHANGE 441, 463 (1996) ("Proponents of guardianship do not urge replacing adoption, rather only using guardianship as an alternative when adoption is inappropriate or impractical for a child.").


\textsuperscript{24.} For an introduction to the issues in choosing and supporting caring relationships for foster children, see Marianne Berry, Adoption in an Era of Family Preservation, 20 CHILD & YOUTH SERV. REV. 1 (1998).
decisions remain with the parent. The state places the child in a placement directly provided by the state or contracts with a non-profit or for-profit private provider to place the child in a foster home. Parenting responsibilities and rights can thereby be shared by the biological parents, state agency, private agency, and foster parents.

For children leaving foster care before they would otherwise age out of the system, non-exclusive parenting is seemingly forgotten. The state looks to either return the child to the parents, perhaps with temporary state supervision, or to place the child for adoption. The ideal exit from foster care, despite the reality for older children, is to resume or develop new exclusive parental control through reunification or adoption, free of state intervention and assistance.

Foster care is meant as a temporary arrangement, and the non-exclusive parenting forced by the arrangement is also meant to be temporary. But for many children, especially the 20,000 teens who age out of foster care, exclusive parenting relationships are never reconstituted. For these children, new options must be developed to provide needed adult resources for them as they exit foster care.

B. Extending the Right to Protection

In her now famous and often misunderstood article on children’s rights, Hillary Rodham Clinton wrote in 1973 that the term “children’s rights” was a “slogan in need of a definition.” Twenty-seven years later, the notion of children’s rights is still not well defined. Perhaps it is more accurate to say that there is no singularly accepted definition or theory of the rights held by children. The rights claimed tend to be of two general types: those advocating for children as autonomous persons under the

26. For a description and analysis of subcontracting with profit and non-profit providers in the foster care system, see Susan Vivian Mangold, Protection, Privatization and Profit in the Foster Care System, 60 Ohio St. L. J. 1295, 1312-13 (1999).
and those placing a claim on society for protection from harms perpetrated on children because of their dependency. I label the first type as the right to empowerment and the second as the right to protection.

The rights of empowerment for children were advocated in the manner in which many rights connected with oppressed minorities were pressed in the 1960s. Some children's advocates explicitly cited children as the next group after African-Americans and women who were entitled to a revolutionary expansion of rights. Empowerment rights were necessary to recognize children's equality with adults. They would give children such privileges of citizenry as the right to vote, work and contract. While empowerment rights may always be held by children, they cannot be exercised until the child reaches a certain level of maturity. While the age at which such an exercise occurs may vary, the key is that the right of empowerment evolves for each child from inability to exercise to ability to exercise.

Unlike the rights connected with empowerment, protection-based rights evolve in the opposite pattern. The very young or incompetent have the strongest claim on these rights, but the ability to exercise them diminishes with maturity. Our foster care system has been developed to give children a right to protection until the age of eighteen or in some cases twenty-one. Independent living

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33. See Emily Buss, Confronting Developmental Barriers to the Empowerment of Child Clients, 84 CORNELL L. REV. 895, 913, 918 (1999) (arguing that developmental issues are important in considering empowerment rights of children). But see Katherine Hunt Federle, The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client, 64 FORDHAM L. REV. 1655 (1996) (arguing that empowerment is an important consideration for all children in determining the model of attorney representation of children).
initiatives for teens in foster care seek to enhance the empowerment rights of children. Regardless of a child's maturity and resources, and regardless of their success in independent living programs, they are liberated from foster care when they reach the age of majority.

Protection-based interests should not end at age eighteen or twenty-one, and ability to exercise empowerment rights is not complete at that time. Instead, the need for the broadened parent-child-state triangle to protect the child continues even as more rights and responsibilities are vested in the maturing child.

C. Exclusive Parenting and the Parent-Child-State Framework in Public Family Law

Constitutional caselaw has fortified the notion of exclusive parenting. The holdings lead to the doctrinal conclusion that even when the state does intervene to protect children, it is in a power sharing role with parents. Other caretakers do not share in the exclusive parent-child-state balance of rights and responsibilities. In the first half of the twentieth century, three Supreme Court cases dealt with the rights of parents or legal guardians to exercise exclusive authority and control over the upbringing of their children in the face of state laws limiting that authority. These cases have long been considered key to understanding state intervention into the "private" family; they establish a tripartite balance of rights and responsibilities among the exclusive parents, the child, and the state. By ignoring the role of all other caretaking actors except parents, the norm of exclusive parenting is accepted and solidified. Absent acceptable state intervention to protect children, parents' exclusive control over their children is protected.

In Meyer v. Nebraska and Pierce v. Society of Sisters, state laws infringing upon the authority of parents were deemed unconstitutional. The Pierce Court recognized the

35. For a fuller discussion of the seminal Supreme Court cases establishing the parent-child-state framework, see Mangold, supra note 22, at 1402-10 (summarized in part in this section).
exclusive rights of parents and their vital duty to their children and the state.

Under the doctrine of Meyer v. Nebraska, we think it entirely plain that the Act of 1922 [mandating that children attend public schools] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.37

This oft-quoted phrase recognizes an exchange of rights and duties between exclusive parents and the state on behalf of children. The parent-child-state triangular balance is introduced constitutionally. This doctrinal framework is accepted as the constitutional contribution of the Court in Pierce, but it ignores the importance of the rights and duties of the provider agency, the Society of Sisters, that were so integral to the Pierce decision. In Pierce, the rights of parents to choose religious over secular education were upheld in striking down a public-school-only state law. The fact that the case was brought by a religious organization, the Society of Sisters, to enjoin enforcement of the law and the importance of such religious organizations in the community is lost in the later constitutional analysis.

The Court in Prince v. Massachusetts built upon the foundation laid by Meyer and Pierce by further articulating the parent-child-state framework. The Prince Court held valid a state child labor law against both the legal guardian’s assertion that the law violated her right to raise the child as she saw fit and the child’s right to practice Jehovah Witness beliefs by selling religious magazines.38 In discussing the applicable precedents, the Court limited the holdings of Meyer and Pierce to an exchange of rights and duties among parents, children and the state:

Previously, in Pierce v. Society of Sisters, this Court had sustained the parent’s authority to provide religious with secular

37. Pierce, 268 U.S. at 534-35 (citation omitted).
38. Prince v. Massachusetts, 321 U.S. 158 (1944) (stating appellant is caretaking aunt). The three cases building the parent-state-child framework of rights and responsibilities are all brought by “others.” See id.; see also Meyer v. Nebraska, 268 U.S. at 391 (1923) (stating plaintiff is teacher); Pierce, 268 U.S. at 511 (stating plaintiff is private provider agency).
schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in *Meyer v. Nebraska*, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life that the state cannot enter . . . . It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . .

The *Prince* Court focused on the limits of state and parental control over children, and obscured the holding in the earlier cases that included rights and duties of other rights holders, namely teachers, schools, and private providers. By defining the parent leg of the triangle as an exclusive realm and relying on a narrow, three-party balance of rights and responsibilities, the *Prince* Court further established the parent-child-state framework for considering liberty rights and concurrent duties.

This framework was not further developed by the Supreme Court until the 1972 case of *Wisconsin v. Yoder* reinforced the exclusive authority of parents. That case resulted in a successful challenge to compulsory education laws imposed on the Amish. In *Yoder*, parents had been convicted under a Wisconsin law requiring attendance at school until the age of sixteen. The parents argued that sending their teens to school past the eighth grade violated their Amish beliefs and lifestyle. The Court agreed with the parents and relied upon the parent-child-state balance established in *Meyer, Pierce*, and *Prince*. The Court stated in relevant part:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made

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40. See id.
to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious formative years have a high place in our society.

The Yoder Court quoted and relied upon Meyer, Pierce, and Prince extensively in a decision that worked within a balance of exclusive rights and responsibilities between parents and the state and further developed the closed triangular doctrinal framework. 42

Indeed it seems clear that if the State is empowered, as parens patriae, to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in Prince, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children . . . . If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed: "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations . . . ."

Meyer, Pierce, Prince, and Yoder dealt with state intervention into parental authority but there were no Supreme Court public family law cases dealing with state custody of children. In Santosky v. Kramer 45 and then in DeShaney v. Winnebago County Department of Social

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42. Id. at 213-14 (citations omitted).
43. The rights of children were not considered explicitly by the majority but they were raised by Justice Douglas in his dissent. The framework developed was a triangle of rights and duties on behalf of, but not owed to or by, the child. See id. at 241 (Douglas, J., dissenting) (arguing for a remand to consider the wishes of the children whose parents were convicted under the law).
44. Id. at 232-33.
45. 455 U.S. 745 (1982).
parental rights and duties and state rights and duties toward abused and neglected children were addressed by the Supreme Court. The parent-child-state framework was imposed on public family law. In *Santosky*, the Court held that the standard necessary to involuntarily terminate parental rights was “clear and convincing evidence.” Even when children were in the dependency system and their care was subject to procedural safeguards at each juncture, the Court found that the importance of the parental right to the care and control of their child could not be severed absent a showing by the state of clear and convincing evidence of unfitness. The *Santosky* Court relied on a line of cases, beginning with *Meyer*, *Pierce*, and *Prince* to demonstrate historical recognition of exclusive parental rights.

Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. The fundamental liberty 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 relations are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

In *DeShaney*, the exclusive control of parents was upheld in a case whose facts were deeply challenging to the notion of exclusive parenting. The court declined to find a state duty to protect a child who was in the custody of his father, not in state custody, when the child suffered permanent serious injury at the hands of his father. The Winnebago County Department of Social Services was

47. *Santosky*, 455 U.S. at 769.
48. See id.
49. Id. at 753 (citations omitted).
51. For a provocative discussion of the Thirteenth Amendment as the more appropriate cause of action in this case, see Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).
repeatedly informed of incidents of abuse and the risk of further abuse, but the agency did not remove the young child from his father's care. The Court reasoned that the State's right to intervene, to investigate and monitor the situation, did not implicate a duty to protect the child who remained in his father's care. In accordance with the parent-child-state framework developed in the Meyer-Pierce-Prince line, the state had not taken on the custodial right and therefore did not hold the accompanying duty to protect the child. The right of control had been left exclusively to the father, and the child could not make out a liberty claim for denial of a duty to protect based on the father's acts of "private violence."

These Supreme Court decisions determined the parameters of the parent-child-state relationship. Although the interests of additional parties were present in the early cases—the teacher and schools in Meyer, the private provider Society of Sisters in Pierce, the caretaking aunt in Prince—the decisions stand for a line of family law cases which developed a framework for analyzing parent, child, and state rights and responsibilities in the face of state intervention. Even though additional parties were intimately involved in the cases and in the lives of the children affected by the challenged laws, the decisions are accepted as precedents for a family law jurisprudence which operates as if only parents, children, and the state were involved in the cases or hold rights and duties in the lives of children. In the latter cases, when the state does intervene based on the child's right to protection from abuse and neglect, the norm of exclusive parenting persists. The state may intervene into the otherwise exclusive parent-child relationship, but such intervention is structured to protect parental rights. When state intervention in the form of custody is necessitated, it ideally ends when the exclusive biological parent-child relationship is resumed or when the state terminates parental rights in favor of an exclusive adoptive relationship.

52. See DeShaney, 489 U.S. at 191.
53. See id. at 197.
A. Legislating Intervention Based on the Right to Protection

The exclusive parent-child relationship can be disturbed by allegations of abuse or neglect. All states have in place a child protection system which responds to such allegations by investigating families and temporarily removing children when it is deemed necessary for their safety. Sometimes children are voluntarily placed outside the home by parents during the course of the investigation, and sometimes a court mandates the placement. When placed, these children enter a system of out-of-home care which can include non-relative foster family homes, foster homes provided by relatives called “kinship homes,” group homes or larger residential settings. Once placed in out-of-home care by the child protection system through the voluntary or involuntary temporary surrender of parents, these children become foster children. Foster care is always meant to be temporary. A permanency plan is written for every child in care with a recognized goal (e.g., reunification, adoption, independent living) and a set of action steps to achieve that goal.

Until the mid-twentieth century, private provider

54. For a fuller discussion of the progression of federal legislation to address child abuse and neglect, see Mangold, supra note 22 (summarized in part in this section).


56. A voluntary placement agreement with the parent or legal guardian or a court adjudication is necessary for federal reimbursement for the placement under 42 U.S.C. § 672(a)(1) (Supp. 1998).

57. This article focuses on out-of-home care provided through the child protection system and not as a result of delinquency, mental illness or status offenses which result in placement outside the child welfare system. For a discussion of foster care in the delinquency system, see Burt Galaway et al., Specialist Foster Family Care for Delinquent Youth, 59 FED. PROBATION 19 (1995). For a discussion of privatization of care in these systems, see Mangold, supra note 26, at 1300 & n.14.
agencies championed interventions on behalf of abused and neglected children. States made fledgling efforts on behalf of individual children, but neither the civil nor the criminal response was uniform or broadly applied. State criminal prosecutions for abuse continued without any federal legislative guidance into the 1970s. No federal law challenged the exclusivity of the "private family."

A fifty-state response ultimately led the federal government to mandate uniformity in the treatment of abused and neglected children. A seminal event in the history of state intervention into the exclusive, private realm of the family to protect children from child abuse and neglect was the 1962 publication of *Battered Child Syndrome* by Dr. Henry Kempe. Kempe was a pediatrician who worked with pediatricians and radiologists to identify causes of suspicious injuries to children. With new knowledge about injuries that could only be caused by abusive behavior, states moved to codify responses to protect children. Between 1963 and 1967, *every* state passed a statute requiring some form of reporting of incidents of child abuse. Such reporting is the initial trigger for state intervention into the exclusive parent-child relationship. Reporting triggers the state response based on a child's right to protection from abuse and neglect.

In 1973, the Senate Subcommittee on Children and Youth of the Committee on Labor and Public Welfare held hearings in Washington and at children's hospitals around the country on the needs of abused and neglected children. Bills were introduced in both the House and Senate, but the Senate subcommittee chaired by Walter Mondale held the main hearings. In a letter of transmittal to the Senate Committee Chairman, Mondale explained the need for legislation:

The Subcommittee held hearings in Washington, New York, Denver and Los Angeles. Members of the Subcommittee personally visited victims of child abuse in hospitals and observed firsthand

60. See *Child Abuse Prevention Act, 1973: Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 93d Cong. 2 (1973) [hereinafter *Mondale Hearings*].
the operations of multidisciplinary child abuse teams in several cities. We were appalled to learn how many abused and neglected children there are and how little is being done to help them and their troubled families. Statistics vary widely, but there is little question that thousands and thousands of youngsters suffer severe physical and emotional abuse every year. This is a problem that cuts across social and economic barriers. It occurs in all kinds of families and in all kinds of neighborhoods. Yet there was no focused Federal effort to deal with the problem. Nowhere in the Federal government could we find one official assigned full time to the prevention, identification and treatment of child abuse and neglect.

One year later in 1974, the Child Abuse Prevention and Treatment Act (CAPTA) was passed. CAPTA initiated a federal response to child abuse based on a child's right to protection by the state where there is evidence of parental harm. It formulated the mandates for the development of a bureaucracy within the Department of Health, Education, and Welfare (HEW) (now called the Department of Health and Human Services) to gather information and expertise on the problem of child abuse, a largely undocumented subject at the time. It also provided funding through HEW for state demonstration projects that were broadly defined in terms of federal directives for their operation. Most important for the subsequent history of the federal/state relationship addressing child abuse, CAPTA contained provisions for a grant program. Unlike the demonstration projects, eligibility for grants required states to follow a series of mandates in order to receive the funds. Those provisions concerned reporting, investigating, confidentiality of record keeping, and law enforcement cooperation. They were the earliest version of the more

61. Id. at 2 (letter from Walter Mondale to Hon. Harrison A. Williams).
63. See Mondale Hearings, supra note 60 (Letter of Transmittal).
complete and complicated federal-to-state reimbursement system which funds state dependency systems today.

The key state response to child abuse became the mandatory reporting, investigating, and record-keeping system that is commonly known as the child protective services system. While all states had some form of reporting law in place before CAPTA, few met the more rigorous CAPTA requirements before 1974. CAPTA, in effect, maintained continuing attention on reporting laws, confidentiality, and investigation. It established a minimum state response, determining when exclusive parental control could be questioned and temporarily interrupted, and which children had a plausible right to protection.

B. First Option: Recreating Exclusive Parenting Through Reunification and Adoption as Permanency Goals

CAPTA addressed the “front end” of the system, bringing attention to troubled families and children and investigating them. It soon became clear that permanency planning was crucial as children were being placed in foster care in increasing numbers. Following passage of CAPTA, the number of children reported as abused and neglected exploded, and state-based foster care systems were flooded with children placed as a result of reporting and investigation through child protective services. Senator Cranston summarized the situation before the Senate in 1979:

The number of children in foster care in 1977 was approximately 500,000—nearly three times the number of children in foster care as compared to 1961. In only one of every five cases does the services plan for these foster children recommend a specific length of placement. In other words, the so-called temporary provision of foster care has no definite target date for ending the placement and for placing the child in a permanent family setting. Over half the children in foster care have been away from their families for more than 2 years—about 100,000 children have spent more than 6 years of their lives in foster care. Nearly one-fourth of the children have been in three or more foster family homes. Even in cases where the agency had developed a plan for returning the child to his or her home, in one-third of the cases, there was no plan for visits between the child and the parent or another person who would care for the child if returned home. There are more
than 100,000 children in foster care awaiting adoption. 68

As reports mounted thanks to CAPTA requirements, foster care became the expedient and perhaps sole resource to address the children's safety. 69

Concerns that children were being unnecessarily placed outside their homes and were languishing without permanency in foster care led to passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA). 70 Many of the children were neglected, not abused. For such children, it was hoped that temporary supportive services would enable parents to resume their exclusive authority and safely care for their children. The AACWA imposed the mandate that states provide a plan to the federal government requiring the state-based public agency to make “reasonable efforts” to prevent placement in foster care or achieve reunification for children temporarily placed. 71 The law also provided for adoption subsidies to encourage the adoption of children out of foster care who could not be reunified. 72 States codified the reasonable efforts and adoption language in their laws. 73 If states failed to meet the mandates of the law to plan for resumed or new exclusive parenting relationships, they would risk losing eligibility for matching federal reimbursement for their foster care expenses. 74

As a consequence of the fiscal incentives offered in AACWA, family preservation efforts to reunify families flourished, and the rate of increase of foster care placement decreased and nearly leveled off between 1982 and 1986. 75 Unnecessary foster care placement and foster care drift were addressed by requiring case planning, case reviews, reunification efforts and subsidies for adoptions of children leaving foster care. 76 The law required that whenever the

69. Id.
determination to place a child in foster care was pending, the court had to make a finding as to whether "reasonable efforts" had been made to prevent the placement. The hope was that this procedural requirement could reduce the unnecessary placement of children in foster care when services to their families could maintain them safely at home. 77

The provisions of the Social Security Act codifying the AACWA have been revised over the past two decades to require a myriad of planning processes in exchange for federal reimbursement for foster care. 78 The state is required to have a written document for each child in care which includes, in part,

... a plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child. 79

The permanency aspects of case planning are further codified to require states to document their activities:

In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include child specific recruitment efforts such as the use of State, regional, and national adoption exchanges. 80

Considering the reasonable efforts required in the federal law which sets the framework of mandates for each of the state child welfare systems, the overarching goal, at least since 1980, has been reunification with the biological

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80. Id.
parents. If reunification is unworkable, an alternative exclusive parenting arrangement is sought.

Following passage of the AACWA, criticism began to mount over the perceived emphasis on reunification. While the law had also provided for adoption subsidies to encourage and support the adoption of children out of foster care, the emphasis on reunification was criticized for fostering a climate in which children were left in unsafe homes and sometimes returned to unsafe homes. The deaths of several children at the hands of their caretakers when public child welfare agencies knew of the dangers posed by the parents raised the urgency of reform efforts.

C. Second Option: Independent Living as a Permanency Goal

Revisions in planning requirements specifically addressed the needs of older children in foster care in the mid 1980s. In 1986, the Independent Living Initiative (ILI) was passed. For children sixteen and over, the ILI requires specific planning to help these older children before they age out of the foster care system. These planning requirements were expanded by the Foster Care Independence Act in 1999 to include more types of services for a longer period of time for children aging out of care. The provisions of the ILI provide funding for states to assist children who were currently or had in the past received foster care maintenance payments or had been in foster care. The goal of the ILI is “to help the individuals participating ... to prepare to live independently upon leaving foster care.” The programs suggested by the federal legislation for states to provide to older foster children included programs to “enable participants to seek

82. See generally NEW YORK STATE COMMISSION ON CHILD ABUSE, FINAL REPORT (1996).
83. See id.
a high school diploma[,] ... vocational training[,] ... provide training in daily living skills[,] and[...] provide each participant a written transitional independent living plan which shall be based on an assessment of his needs.88

The Foster Care Independence Act, discussed in Part III, infra, attempts to improve independent living services. The plight of older foster children was detailed in the legislative hearings for the Foster Care Independence Act. The recent legislation inadequately addressed the problems revealed. More is needed to provide parental supports, not just programmatic sessions, for children aging out of care for whom no exclusive parenting relationship could be arranged.


"Those of us who have teenagers know that when the child becomes 18, they still need the guidance, the support, the direction of parents."88

In the 1990s, the number of children in foster care began to increase once again. While the reasons for this are complex, the increase is usually attributed to the crack epidemic in the inner cities and the increasing percentage of children living in desperately poor conditions with young, unmarried mothers.89 A series of highly publicized brutal deaths of children who were "known to the public agency" and provided with preventive services in their own homes instead of being placed in foster care led yet again to an outcry for reform of the system.90

89. See id.
90. See generally New York State Commission on Child Abuse, supra note 82. For a discussion of the perceived problems with the reasonable efforts requirement leading to the enactment of the Adoption and Safe Families Act, see Christine H. Kim, Putting Reason Back into the Reasonable Efforts Requirement, 1999 U. Ill. L. Rev. 287 (1999).
A. Background to Legislative Reform

The Adoption and Safe Families Act of 1997 (ASFA)\(^1\) was a partial response both to the outcry for swifter removal from abusive homes and for expedited adoptions. The new law provides exceptions to the reasonable efforts requirement introduced in the AACWA when "aggravated circumstances" are present.\(^2\) The section providing for the exceptions appears uncontroversial at first glance, citing torture, death of another child, or sexual abuse as examples, but a more broad exception may come from the "aggravated circumstances" catch-all provision which is left to the states to define.\(^3\) The full operational effect of the new law is yet unclear, but it is significant in signaling the first mandated retreat from reunification efforts.

In 1997, with the passage of ASFA, Congress altered the federal mandates on states providing foster care services to abused and neglected children.\(^4\) In 1999, Congress again amended the law governing these placements by focusing on the needs of older children in out-of-home care and passing the Foster Care Independence Act.\(^5\) These two laws represent a change in philosophy from the previous law, moving from family reunification toward alternative placements via adoption or independent living arrangements. They also highlight the difficulty in legislating to protect the needs of older children in care.

ASFA was passed to clarify that the health and safety

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\(^3\) Id.

\(^4\) We do not yet know the full effect of allowing states to limit the cases in which reunification services are provided. State laws were only recently amended to clarify the new reasonable efforts requirements. See, e.g., 1999 N.Y. LAWS 107 (amending N.Y. SOC. SERV. LAW § 359-a (McKinney 1992)). A broad amendment by states to the requirement of providing reunification services could further shift the balance in focus away from reunification and toward removal, placement, and adoption for more children.


of the child should always be paramount and to detail circumstances under which reasonable efforts did not have to be pursued. ASFA retreats from the goal of reunification in certain cases where "aggravated circumstances" or felony convictions exist. In a shift away from reunification and toward adoption, the law also required that child welfare agencies file petitions to terminate parental rights for children in care for fifteen of the last twenty-two months.

In the earlier House version, the law expedited termination proceedings only for children under the age of ten. While the law ultimately passed did not include this maximum age requirement, the sentiment of the Congress throughout the debate was that the bill would impact adoptions for this preteen population. The final law includes additional important provisions for older children, namely allowing states to designate them as "special needs" children due to age and making them eligible for adoption assistance in the form of health insurance.

Exclusive parent-child relationships through either adoption or reunification, the first options in permanency planning, were not always a viable option for children in foster care. The Foster Care Independence Act was passed to enhance services for children aging out of foster care with the second option goal of "independent living." In a sense, this law was necessary because of the failure of all previous efforts to find and support families for children in foster care.

B. Gap in Reform Legislation for Older Foster Children

The Adoption and Safe Families Act is not targeted to assist older children in foster care. For many older children, relationships with birth families are longer-lasting if not stronger, adoptive families are harder to locate, and permanency, through termination of parental rights and

97. For an article critical of this shift in emphasis, see Naomi R. Cahn, Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L. J. 1189 (1999).
For those who remain in foster care because their families cannot safely care for them, the failure to successfully reunify or to identify an adoptive family may mean that the children leave foster care with no caretakers. For them, the goal of "independent living" becomes the fall-back permanency option. Faced with this, the public agency with custody of the child in foster care attempts to prepare the aging-out foster child with the skills and resources necessary to succeed on their own. Instead of broadening the parent-child-state triangle, it is collapsed into efforts to prepare the youths for independent living with no parental and only limited state assistance available.

Unfortunately, many young adults who age out of foster care do not successfully make the transition to independent living by the time they age out of care. Too many reappear in shelters, jails or on the streets. The needs of aging-out foster children were at least partially recognized by Congress in passing the 1999 Foster Care Independence Act. This law provides funding for services to assist youths up to age twenty-one who are aging out of the foster care system into independent living. Additionally, this law provides reimbursement to the state for services for a few more years, but does not provide a creative solution to address the need for a parental figure.

In passing the law, Congress explicitly recognized that the overhauls of the 1997 Adoption and Safe Families Act were not sufficient in insuring permanent homes for all foster children. In debate, Rep. Pryce remarked:

In 1997, Congress tried to help these children by passing legislation to facilitate the adoption of children in foster care. As a result, the dream of a permanent family and a loving home is becoming a reality for more and more children. Yet despite our best efforts to streamline the system and find willing families to adopt these kids, the reality is that there are thousands of children who will never leave the foster care system during their

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100. States have standards for termination of parental rights which usually include abandonment, permanent incapacity to parent and failure to remedy the circumstances which placed a child into foster care. Federal law now requires that petitions be filed if a child has been in placement for fifteen of the past twenty-two months, but if contested, states will still need to meet their statutory grounds for termination. The federal law includes exclusions from the termination requirement. 42 U.S.C. § 675(5)(E) (1994 & Supp. 1998).
childhood.\textsuperscript{101}

Rep. Camp expressed similar understandings when he stated:

I was very proud to be a part of our efforts to revamp the Foster Care system when this House passed the Adoption and Safe Families Act two years ago. And our efforts are paying off—preliminary numbers show that adoptions of foster children have increased 40 percent since 1995.

But this bill takes the next step—it recognizes that no matter how hard we work, some kids will turn 18 in foster care. They'll "age out" of the foster care system without a network of family and loved ones to turn to.\textsuperscript{102}

Despite widespread recognition of the need for "family and loved ones to turn to,"\textsuperscript{103} the Foster Care Independence

\begin{footnotesize}
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\item 103. Many members of Congress echoed this plea to address the need for caring parent-like adults for older foster children. Rep. Pryce stated, "As parents, we do not cut off our children once they turn eighteen, although I think it is safe to say that even if we did, our children would have a better chance at survival than the products of the foster care system." 145 CONG. REC. H4958 (1999). Rep. Rangel remarked, "Most all of us know as parents that a child becoming 18 does not necessarily mean that they are ready to assume the responsibility of adulthood." 145 CONG. REC. H4960 (1999). Rep. Greenwood added, "When we think of ourselves as parents, how many of us with our children, who have the fortune to have had good, stable upbringings where they are loved, how many of us say, here is your 18th birthday card, hit the street? We do not do that." 145 CONG. REC. at H4961 (1999). Rep. Cardin stated, "How many of us as parents tell our children at 18 that they are on their own? We have a responsibility." 145 CONG. REC. H4961 (1999). Rep. Foley remarked, "We can all remember how hard growing up can be. Fortunately for most of us we had loving and supportive of family and parents to nurture, encourage, and teach us how to gradually enter adulthood. I could never imagine the feelings of fear or uncertainty that a foster care [child] approaching his or her 18th birthday must have." 145 CONG. REC. H4961 (1999). Rep. Eshoo said, "For those of us with teenage children, we know that 18-year-olds aren't often prepared to live on their own, paying their own bills." 145 CONG. REC. H4964 (1999).
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Act only provides for increased funds for enhanced programming by the states and not for family supports for children who need them.

Coupled with the Adoption and Safe Families Act, the Foster Care Independence Act seems to provide an increased but still inadequate spectrum of permanency options for older foster children. First, they can be reunified with their biological families. For these children, the reunification takes place before they age out of foster care so that they do not "age out of the system." Instead, they leave the system to return home before they age out. Another exclusive parenting option is adoption via state termination of parental rights to free the child for adoption and identification of an adoptive family. Again, these children leave the foster care system with an exclusive parent who replaces the state agency which had temporary custody during the period of foster care. For those children who are neither reunited nor adopted but instead age out of the system with no identified caretaker, they are left to independent living. If they live with or receive support of some kind from relatives or other informal custodians, there is no public assistance for such accommodation.

C. Plight of Older Foster Children

Many children still exit foster care with no home, adult assistance or real promise of a future. There are approximately 500,000 children in out-of-home care on any

Importantly, underneath it all is the security of knowing that if it doesn't work out, you can always go back home. (And don't all the parents of young adults in this room know that they often end up back at our front door?)


PERMANENCY PLANNING

Nearly one-third of the children entering care in any year or in care during that year are teens. Of the children leaving care, over 40% are teenagers. Only 11% of these are in care due to status offenses such as truancy or ungovernability or delinquency. The remainder are in care mainly due to protective services, parental condition or absence, or relinquishment of parental rights. Data is available from the federal government from twenty-four states on the outcomes for children of all ages exiting out-of-home care. In the six months from April 1, 1996, through September 30, 1996, 63% who left care were reunited with their families and 11% were adopted. For 74% of children exiting care, the first option of reconstituting exclusive parenting was achieved.

In the findings accompanying the Foster Care Independence Act, Congress estimated that 20,000 teens leave foster care each year “because they have reached eighteen years of age and are expected to support themselves.” Unable to arrange an exclusive parenting permanency plan, the second option of independent living remains the fall-back option. For these children, an expectation of successful independence is uniquely problematic.

Studies show that nearly 30 percent of these youths average nine years in foster care without a permanent living arrangement. As a result, within two years of leaving foster care, only half have completed high school, fewer still are employed, and nearly 60 percent of the young women have given birth, almost always outside of marriage.

Studies of children who have aged out of foster care are

106. Id. at 786.
107. Id.
108. Id. at 790.
109. Id.
110. Id. at 796.
scarce, but findings are consistently disturbing. One study of all forty-six young men discharged from an independent living group home in New York City found that the overall mean length of time these young adults had spent in care before discharge was eight years. Three studies relied upon by government sources report the tragic next chapter for children exiting foster care.

As success in the current job market becomes even more tightly connected to educational attainment, children aging out of the foster care system are ill-equipped to compete. The Westat study found that 46% of the 810 young adults studied who had left foster care had not completed high school. That number was 37% for Courtney and Piliavin

113. For example, many foster youths have a difficult time making the transition from the foster care system to self-sufficiency. While there are few available studies tracking youths who have exited foster care, our review of these studies reveals some consistent findings. Research has shown that many former foster care youths have serious education deficiencies and rely on public assistance. In addition, former foster care youths often find themselves lacking adequate housing. 


116. See Testimony, supra note 113, at 18-19 (citing Richard P. Barth, On Their Own: The Experiences of Youth After Foster Care, 7 CHILD & ADOLESCENT SOC. WORK 419 (1980); Mark E. Courtney et al., Transitions from and Returns to Out-of-Home Care, 71 SOCIAL SERVICE REV. 652, reprinted in MARK E. COURTNEY & IRVING PILIAVIN, TRANSITIONS FROM AND RETURNS TO OUT-OF-HOME CARE (1998). For an explanation on the findings of the Courtney study, see Testimony, supra note 113, at 22-24 (statement of Mark E. Courtney, Assistant Professor, School of Social Work and Institute for Research on Poverty, University of Wisconsin-Madison); WESTAT, INC., A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH: PHASE 2, FINAL REPORT (1991). But see id. at 22 (citing Maria Scannapieco, et al., Independent Living Programs: Do They Make a Difference?, 12 CHILD & ADOLESCENT WORK J. 381 (1995)) (showing that foster children in existing care who have received independent living programming during their stay in foster care have better success than those who do not).

117. See Testimony, supra note 113, at 18-19 (citing WESTAT, INC., supra note 116).
who studied 113 former foster children and 38% for Barth
who studied fifty-five former foster care youths. 118

Employment success was equally dire. Westat, the
largest study, found 51% unemployed 2.5 to four years after
leaving care. 119 Sixty-two percent had not maintained a job
for at least one year. 120 Courtney and Piliavin found 39%
unemployed twelve to eighteen months after aging out of
the system. 121 Barth found 25% unemployed one to ten years
after leaving foster care. 122
Perhaps the two most disturbing correlations are
between aging out of foster care and homelessness 123 and
incarceration. Westat found that 25% of the former foster
children had been homeless at least one night. 124 Courtney
and Piliavin found that 12% were homeless at least once
and that 27% of males and 10% of females had been
incarcerated at least once in the twelve to eighteen months
since exiting care. 125 Barth recorded that 35% had been
homeless or moved frequently and that 35% had spent time
in jail or prison. 126

118. See Testimony, supra note 113, at 19 (citing WESTAT, INC., supra note 116).
119. See Testimony, supra note 113, at 19 (citing COURTNEY & PILIAVIN, TRANSITIONS FROM AND RETURNS TO OUT-OF-HOME CARE (1998); Richard P. Barth, On Their Own: The Experiences of Youth After Foster Care, 7 CHILD & ADOLESCENT SOC. WORK 419, 426 (1990)).
120. See Testimony, supra note 113, at 19 (citing WESTAT, INC., supra note 116).
121. See id.
122. See Testimony, supra note 113, at 19 (citing COURTNEY & PILIAVIN, supra note 119).
124. See Testimony, supra note 113, at 19 (citing WESTAT, INC., supra note 116).
125. See Testimony, supra note 113, at 19 (citing COURTNEY & PILIAVIN, supra note 119).
126. See Testimony, supra note 113, at 19 (citing Richard P. Barth, On Their Own: The Experiences of Youth After Foster Care, 7 CHILD & ADOLESCENT SOC. WORK, No. 5, 424 (1990)).
Invisible to these counts are the children who have no stable home but live night-to-night on the generosity of friends or acquaintances. Called “couch surfers” in child welfare lingo, these teens are at risk for every frightening possibility of the street. \(^{127}\) “The couch surfing phase is preliminary to being out in the street.” \(^{128}\) The numbers for teen pregnancy, \(^{129}\) inadequate health care and other indicators of maladjustment are similarly disturbing.

In introducing H.R. 3443 which later became the Foster Care Independence Act of 1999, Congress emphasized its concern for this vulnerable group of former foster children and made the following findings:

1. States are required to make reasonable efforts to find adoptive families for all children, including older children, for whom reunification with their biological family is not in the best interests of the child. However, some older children will continue to live in foster care. These children should be enrolled in an Independent Living program designed and conducted by State and local government to help prepare them for employment, postsecondary education, and successful management of adult responsibilities.

2. Older children who continue to be in foster care as adolescents may become eligible for Independent Living programs. These Independent Living programs are not alternative to adoption for these children. Enrollment in Independent Living programs can occur concurrent with continued efforts to locate and achieve

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\(^{127}\) See Susan K. Livio, Freedom Can Mean Problems for Ex-Foster Kids Hitting Adulthood, HOME NEWS TRIB., Jan. 3, 1999, at A2 (Many former wards of foster care would be homeless “were it not for the generosity of friends and adults who have looked after him over the years. Social workers call such young people ‘couch surfers,’ for their habit of sleeping on a friend’s couch until they wear out their welcome.”);


\(^{129}\) A 1991 study found that two to four years after leaving foster care, nearly 66% of teens were mothers compared to twenty-five percent in the general population. See BRONWYN MAYDEN, SEXUALITY EDUCATION FOR YOUTH IN CARE: A STATE BY STATE SURVEY, at 5 (CWLA Press, 1996) (citing Sharon G. Elstein, Teenagers Are Adoptable: Strategies for Success, 18 CHILD L. PRAC. 49 (June 1999) (citing WESTAT, INC., supra note 116).
placement in adoptive families for older children in foster care.

(3) About 20,000 adolescents leave the Nation's foster care system each year because they have reached 18 years of age and are expected to support themselves.

(4) Congress has received extensive information that adolescents leaving foster care have significant difficulty making a successful transition to adulthood; this information shows that children aging out of foster care show high rates of homelessness, non-marital childbearing, poverty, and delinquent or criminal behavior; they are also frequently the target of crime and physical assaults.

(5) The Nation's State and local governments, with financial support from the Federal Government, should offer an extensive program of education, training, employment, and financial support for young adults leaving foster care, with participation in such program beginning several years before high school graduation and continuing, as needed, until the young adults emancipated from foster care establish independence or reach 21 years of age.\(^\text{130}\)

The purpose of the law was to enable states and localities to provide a spectrum of training programs to better prepare children aging out of foster care. The bill never included new or creative alternatives to create families or supportive homes for these children. The purpose was described as follows:

(A) PURPOSE—The purpose of this section is to provide States with flexible funding that will enable programs to be designed and conducted—

(1) to identify children who are likely to remain in foster care until 18 years of age and to help these children make the transition to self-sufficiency by providing services such as assistance in obtaining a high school diploma, career exploration, vocational

\(^{130}\) H.R. 3443, introduced November 18, 1999, S. 1327, 106th Cong. § 101(a)(3) (1999), has some additional information, which states:

In addition, approximately 5,000 adolescents (foster children over the age of 12) are adopted out of the foster care system each year, of whom approximately 620 are over the age of 16 at the time of their adoption. A large percentage of these children have not yet completed their high school education.
training, job placement and retention, training in daily living skills, training in budgeting and financial management skills, substance abuse prevention, and preventive health activities (including smoking avoidance, nutrition education, and pregnancy prevention);

(2) to help children who are likely to remain in foster care until 18 years of age receive the education, training and services necessary to obtain employment;

(3) to help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and education institutions;

(4) to provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults; and

(5) to provide financial, housing, counseling, employment, education and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood.\[131\]

Rep. Johnson, co-author and lead co-sponsor of the legislation with Rep. Cardin, summarized the goal of the legislation as “to prepare these young people to be able to move into the work force or to continue with their education on the very day they leave foster care. These children face very difficult problems and we must create programs to help them learn to be self-reliant.”\[132\]

\[131\] H.R. 3443, 106th Cong. was passed by the House of Representatives on November 18, 1999 and by the Senate on November 19, 1999 as the Foster Care Independence Act of 1999. It was signed into law by President Clinton on December 14, 1999. The earlier version debated on the floors of the House and Senate, H.R. 1802, 106th Cong. (1999) contained substantially similar finding and purpose sections. H.R. 1802 was passed by the House in June. Both H.R. 3443 and H.R. 1802 were titled, “The Foster Care Independence Act of 1999.” Finding (a)(2) was added in H.R. 3443.

The intent of the Foster Care Independence Act was not to create families or family supports but rather to create programs to assist the teens into self reliance. Only up to 30% of any states funding under this legislation can be used for room and board for children ages eighteen to twenty-one. These funds are valuable in helping to subsidize the former foster child’s existence but not in seeking committed adult supports for the youths.

PART IV: CREATING A NON-EXCLUSIVE PARENTING THIRD OPTION: OPEN ADOPTION, GUARDIANSHIP, MENTORSHIP

“In hindsight, I can say that if you want to prepare a child for independent living, you do one thing. Teach him to set up a support system.” This statement was made by Amy Clay, a nineteen-year-old foster youth and college student.133

In hearings before Congress on the Foster Care Independence Act, the story of Shauntee Miller, a young mother in foster care, highlights the need for creative non-exclusive parenting for teens, especially teenage mothers. Ms. Miller lives in an independent living program apartment and sees her daughter, also in foster care, on weekends.134 Is the foster parent of Ms. Miller’s daughter a possible guardian or mentor for the young mother? Without such a parental figure, can Ms. Miller realistically reunify safely and permanently with her daughter? If the young mother’s rights are ultimately terminated and her daughter is adopted by the daughter’s foster parents, could an open adoption which allows for some ongoing contact between Ms. Miller and her daughter be beneficially facilitated?

the foster children was detailed by the speaker, “Today, two-thirds do not complete high school, 61 percent have no job experience, and 38 percent are diagnosed emotionally disturbed. Most end up jobless, addicted, pregnant, or in jail.” Id.


A. Open Adoption

I use the term open adoption under the broadest definition, requiring neither a formal contract nor court order but allowing for some ongoing contact to facilitate the surrender of rights and the finalization of the adoption. Open adoption requires the termination of parental rights but allows for some continued contact between the birth family and the child. It could be as minimal as letters and pictures or could involve ongoing visitation. Some distinguish open adoption from cooperative adoption. In cooperative adoption the ongoing contacts are arranged by mutual collaboration or agreement, a contract which is made between the birth parent(s) and the adoptive parents. The term open adoption is used more generically to refer to any adoption in which confidentiality is comprised by opening records, exchanging information, visiting, etc. In this article, the purpose in suggesting open adoption is to allow ongoing contact in whatever form will facilitate the finalization of the adoption and thus some familial supports for older children in foster care. The adoption may be open by informal agreement, contract or court order. Like traditional closed adoptions, open adoptions should be eligible for all forms of adoption assistance and subsidies.

States only began to enact adoption statutes in the middle of the nineteenth century. In the twentieth century, legislatures amended the laws by providing confidentiality for the process, thereby creating the notion of closed

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135. Carol Sanger uses such an inclusive working definition to describe both direct and indirect contact between the child, birth parents, and adoptive parents. She makes the point that open adoption "increases the number of children available." Carol Sanger, Separating from Children, 96 Colum. L. Rev. 375, 492 (1996). Others have echoed the prospect, emphasized here for older children, that open adoption may provide stable familial relationships for some children who would not otherwise have parents who could care for them. See Lawrence W. Cook, Note, Open Adoption: Can Visitation with Natural Family Members Be in the Child's Best Interest?, 30 J. Fam. L. 471, 477-78 (1992). But see Carol Amadio & Stuart L. Deutsch, Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives, 22 J. Fam. L. 59, 60-61 (1983-1984) (defining open adoption as an agreement in writing approved by the court).


137. See id.
adoptions. While closed adoptions were the norm in the 1970's, some open adoptions were informally arranged and legally sanctioned at that time. Only a few states legislatively endorse open adoptions.

For all children in foster care with positive memories and bonds to their birth families, open adoption may provide a mechanism for permanency which does not require a total severance of ties with that family. This is especially relevant in cases of adoption by relatives where confidentiality is impossible. For older children aging out of foster care, open adoption may provide a mechanism to allow the contacts that both the child and birth parent want, or allow for ongoing sibling contact. Allowing these relationships to continue in some form may make the termination of parental rights more tenable for both parties. This could facilitate an adoption which could not otherwise occur by assuring the parents that in surrendering their rights and freeing their child for adoption, they will not lose all contact with the child.

B. Guardianship

Guardianship is a judicially sanctioned arrangement— an adult can act as a guardian for a child for the duration of the court order. Guardianship was originally used to oversee a minor's property or estate when his/her parents were deceased or could not otherwise perform this function. Probate guardianships, as they are sometimes called, do not

138. See id. at 1003-05.
139. See generally Annette Baran et al., Open Adoption, 21 SOC. WORK 97, 97-100 (1976) (advocating that open adoption should be accepted as an alternative and discussing an “experiment” in which an author arranged an open adoption).
140. See, e.g., ALASKA STAT. § 25.23.130(c) (Michie 1993); N.M. STAT. ANN. § 32A-5-35(A) (Michie 1995); N.Y. SOC. SERV. LAW § 383(c)(3)(b) (McKinney 1992); TENN CODE ANN. § 36-1-121(f) (1995); WASH. REV. CODE ANN. § 26.33.295(1) (West 1996). Other states have sanctioned open adoption through case law. See, e.g., Adoption of Gwendolyn, 558 N.E.2d 10, 14 (Mass. App. Ct. 1990) (holding that visitation post-adoption is permitted, but at discretion of adoptive parents); Michaud v. Wawruck, 551 A.2d 738 (Conn. 1988) (ruling that contract between birth and adoptive parents was not contrary to public policy).
141. See Appell, supra note 136, at 1011-12.
involve physical custody of the child but are the antecedent to the current use of guardianships by the family or juvenile courts. Probate guardianships, like the guardianships now ordered in the child welfare system, could be for a defined period of time or ongoing. Guardianship traditionally terminates no later than a child’s eighteenth birthday. Just as foster care can continue to age twenty-one by continuation of the placement order, the court arranging the guardianship could have jurisdiction to continue the guardianship to age twenty-one or even beyond.

Today, guardianships are often provided by relative caretakers who have been kinship foster care resources. Guardianship provides for a more permanent status to the arrangement. Guardianship also allows for the discharge of the child from the child welfare system in many instances, ending supervision by the agency and the court except for the negligible supervision that may be provided by the court overseeing the guardianship. It is usually a single guardian or mother and father unit which is identified to provide guardianship. This does not require termination of parental rights and, in that sense, is non-exclusive. Often relatives prefer guardianship to adoption because they do not have to endure a legal battle to terminate the parental rights of their sibling or other relative. Biological parents may be willing to consent to a guardianship by a sibling or other relative but not to adoption which severs their parental rights. Biological parents may participate in the selection of a guardian.


145. Professor Martha Fineman challenges us to separate state support from state supervision of families. For creative permanency planning for children who are over age eighteen, support and supervision must exist along a continuum to meet the individual needs of children and the adults sharing the parental responsibilities for them. See Fineman, What Place for Family Privacy?, supra note 9.

146. For terminally ill parents, stand-by guardianships or joint guardianships are used to plan for the child’s care when the parent is no longer
and may enjoy ongoing visitation with the child. In families where property is available, guardianship also allows the child to inherit from the parent and does not release the parent from financial support.

Guardianships are a form of non-exclusive parenting and are frequently used but are not generally supported by federal subsidy as are adoptions. Guardianships are not currently subsidized by the federal government except by waiver. An end to state intervention and supervision of a well-functioning guardianship may be a permanency triumph; a custodial relationship moves from foster care to guardianship. Unfortunately, with the discharge from foster care comes an end to the subsidy which had been available to provide kinship foster care but is not available for guardianship. This loss of funding may prohibit some relatives from making the move to guardianship.

A demonstration project in Illinois providing for subsidized guardianship predicts that 4000 children will move out of kinship foster care and into more permanent and stable subsidized guardianships under the program. Other states allow for subsidization of guardians although their state funds are not reimbursed by the federal government.

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147. The idea of subsidized guardianship has been circulated for years but never adopted by the federal government. See, e.g., Leashore, supra note 143; Marla Gottlieb Zwas, Kinship Foster Care: A Relatively Permanent Solution, 20 FORDHAM Urb. L.J. 343 (1993). For a discussion of subsidized guardianship as an exclusion from a declining subsidized reimbursement scale, see Gordon, supra note 143, at 691-92.


150. See ALASKA STAT. § 13.26.062 (Michie 1998); ARIZ. REV. STAT. § 8-814
C. Mentorship

The word "mentor" has a Greek origin meaning steadfast and enduring. In Homer's *Odyssey*, Odysseus leaves behind his friend, Mentor, to be the guide and educator of his son, Telemachus. Today, the term is used to describe a variety of adult-child supportive relationships in which the adults offer themselves as short or long term role models for children and offer some guidance to the child. Mentoring programs have existed in the U.S. at least since the turn of the century with the development of the Big Brother Program in 1902. They are increasingly proposed and utilized as a preventive measure against

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152. Mentoring in the one:one model may not be possible for all children. Alternatives are being explored with less intensive interaction. For a study of such program in New York City, see Antronette K. Yancey, *Building Positive Self-Image in Adolescents in Foster Care: The Use of Role Models in an Interactive Group Approach*, 33 ADOLESCENCE 253 (1998).

153. Evaluations of such programs are scarce. For a review of a variety of programs, see Dionne J. Jones et al., *Reaffirming Young African American Males: Mentoring and Community Involvement by Fraternities and Other Groups*, 16 URB. LEAGUE REV. 9 (1993).


155. One positive example of a mentoring program is the NYC Independent Living Partnership where youths and their adult mentors meet semiannually for a weekend retreat and monthly for a support group informally as a network of support. See Gerald P. Mallon, *After Care, Then Where? Outcomes of an Independent Living Program*, 77 CHILD WELFARE 61 (1998). This model provides a network not only of adult mentors but also of former foster children who can support one another in the community. The PRIDE (Personal and Racial/Ethnic Identity Development and Enhancement) program uses successful mentors from the foster child's same cultural background to provide positive role models. This is not a one-one program nor is it a one day seminar. Instead, the program uses a series of group sessions to provide interaction between the foster child and mentor. It is not an intensive form of mentoring, but its effects have been positive. See Yancey supra note 152. But see David L. DuBois & Helen A. Neville, *Youth Mentoring: Investigation of Relationship Characteristics and Perceived Benefits*, 25 J. COMMUNITY PSYCHOL. 227, 227-28 (1997) (defining mentoring as a "one-to-one relationship between a [youth] and a caring adult who assists the [youth] in meeting academic, social, career, or personal goals"
juvenile crime, unemployment, school dropout and teen pregnancy.

The term is used here to describe a supportive adult and to distinguish the mentors from those with guardianship or some other form of parental rights over the child. For children who do not have adults in their lives able or willing to enter into more formal parenting relationships of guardianship or adoption, mentors provide some adult supervision and support which could be extremely necessary at difficult times such as the transition out of foster care. The term usually refers to volunteer adults. Youths receiving independent living services are often served in an aggregate setting with little one-to-one adult mentoring or care. While group homes may attempt to provide life skill development experiences, safety concerns may require home operators to lock away supplies such as laundry detergent or cooking utensils, making it impossible for youths to practice these skills in a relaxed, ongoing way. Given the limitations on obvious group activities such as these, resources for mentor programs are often scarce or non-existent despite the fact that “officials in all locations saw some type of mentoring program as one method to provide youths with a vocational role model and opportunities to practice other independent living skills they have learned.”

Volunteer opportunities should be encouraged, but a more structured, federally subsidized form of mentoring where one or a variety of adults is paid to provide work,

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162. See id. at 21.
school or emotional support to a teen aging out of the foster care system is necessary. Subsidized mentors could insure that no child exits foster care without some committed adult support.

Such mentors could be identified by the public child welfare agency in the same way that foster parents are identified--either by direct contract with the public agency or through subcontracts with not-for-profit and new profit-making entities which provide a variety of services to the child welfare system. Adults interested in assisting children but unable or unwilling to make the commitment as foster or adoptive parents could still play a crucial role in the life of a teen. Alternatively, the teens could identify mentors who might be willing to assist them in their transition to adulthood. Foster parents of siblings or of the children of teenage foster children are examples.

Even for older foster children leaving care to exclusive parenting relationships, open adoptions or guardianships, mentors could provide valuable educational or employment assistance. For children exiting care with no committed adult caretaker, mentors could play a vital role in providing some parental support in the difficult transition from care.

CONCLUSION

The realization that some children leave foster care without caring adults available to assist them challenges the very notion of permanency planning which, in some circles, means that all children who cannot be returned to their biological families are adoptable. At least since 1986 with passage of the Independent Living Initiative, reality has overtaken theory to provide that "independent living" is a suitable goal for permanency planning. In other words, the goal for many children aging out of foster care is "independent living" because the child welfare system


164. See, e.g., Katherine Miller et al., Overcoming Barriers to Permanency Planning, 63 CHILD WELFARE 45 (1984).
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concludes there is no family or permanent home for these teens. The system formulates a permanency plan with that realization in place, based on a right to empowerment triggered solely by age. Permanency planning needs to accommodate third options between exclusive parenting and independent living.

This article examines permanency planning for older children in foster care and looks for creative third options for those children who leave care with no adult parental figure. For many of these children, termination of parental rights of their biological parents is legally impossible, emotionally undesirable or both. For others, parental rights have or could be terminated, but there is no adoptive home identified for them. How can their transition out of foster care and toward adulthood be structured with some adult assistance and support? How can bonds with their siblings be maintained and encouraged?

Caring, responsible adults are necessary to assist children aging out of the foster care system. For children who are not reunited with their families or adopted before they reach the age of majority, it is vital to identify adults who will fill some of the roles which would otherwise be filled by able parents. The concept of non-exclusive parenting is used here to accomplish arrangements for children who maintain a positive bond with their families of origin, parents, or siblings, but cannot live with them safely and securely. It is also used to develop permanency plans for children who do not maintain such a positive bond but whose parents’ rights cannot be legally terminated.

By arguing that children need responsible adults supported by the state even after age eighteen, this article posits that the right to protection so integral to the child welfare system does not cease on a child’s eighteenth birthday. Empowerment is important, and teenage children should certainly be participants in their own permanency planning, but that does not require cessation of the exercise of a right to protection. As child welfare support via the Foster Care Independence Act can continue to age twenty-one, so may the suggested recommendations continue past age eighteen to at least twenty-one when the child is in agreement and the adult support is approved by the child welfare agency or court.

For some children, open adoption or funded guardianship may help to constitute the parental support
they need to successfully enter adulthood. Open adoption could be helpful in cases in which termination cannot be otherwise finalized but the parent is willing to allow another person to act as the primary caretaker and would voluntarily surrender rights if assured of access, however limited, by the parties or court in the future. It could also be an important alternative in cases in which the teen does not desire to sever all ties with his/her biological family but recognizes that they cannot be a custodial resource and has another adult willing to fulfill that role.

More use of guardianships and funding commensurate with adoption subsidies for guardianship relationships may also help achieve permanency for older children in foster care. Funded guardianships could be useful in allowing kinship care to be subsidized outside of state custody or adoption. Perhaps this would enhance the size of the potential custodial pool for older children as some relatives or concerned adults may not want to be involved with the state foster care system or in terminating a relative’s rights but would be willing to take on the caretaking of a child.

For other children, guardians or adoptive parents, even in an open adoption, cannot be identified or sanctioned. These children still need adult support and the assistance of the child welfare system in designing their exit from care to accommodate and reward the support provided. A child welfare system operating in a non-exclusive parenting framework could develop a permanency plan with several mentors, hopefully identified by the child, who share the parenting responsibilities that no single person is willing or able to provide. They are adults, preferably chosen by the child, subsidized to assist older foster children in a myriad of functional and emotional ways to successfully enter adulthood from foster care.

Open adoption, guardianships and mentors are crucial for children aging out of foster care. Such options may be especially beneficial for those foster children who had babies while in care or have siblings with different caretakers. For them, cutting all ties with their birth or foster families may not be their preference even if it is legally feasible. Creative caretaking or third option arrangements in the form of guardianship, open adoption, or designated mentors are currently inadequately funded. Subsidization of these arrangements is vital to close gaps in permanency initiatives passed in recent years.
If properly funded, open adoptions, guardianships and mentorships which accommodate non-exclusive parenting are potential and plausible arrangements for many children for whom reunification or traditional, closed adoption are undesirable or unattainable. If the law could recognize parents as important but not exclusively so, the outcomes for older children could be healthier and more permanent. Instead of focusing on termination/adoption or independent living, older children would benefit from a system that does not disqualify any adults who wish to be a positive presence, no matter how limitedly, in a child’s life. Children aging out of foster care are a group that could significantly benefit from a shared custody relationship facilitated and funded by the state.