Implementation of Standby Guardianship: Respect for Family Autonomy

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I. Introduction

Theresa Morgan, an African-American mother of four, died of AIDS. Two years prior to her death, she placed her youngest child with Diane Peters, a foster mother who intended to adopt all four of Theresa’s children upon her death. Theresa encouraged her older children’s developing relationship with their future foster mother, and executed a will appointing Diane as the guardian of her children. Nevertheless, after her death, the court disregarded Theresa’s carefully developed plan and forced her children to endure two years of uncertainty while litigation about their future ensued. Theresa’s wishes were disregarded largely because she was a poor, African-American, former drug user who died of AIDS.

Unfortunately, Theresa’s children are not alone in their plight. Increasing numbers of poor families living in inner cities, already struggling to survive the challenges of poverty and drug use, are facing the devastation of AIDS. It is estimated that at the end of 1991, 18,500 children and adolescents had been orphaned by the AIDS epidemic. The Orphan Project further estimates that by

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1. The names of parties involved have been changed to protect their privacy. For details of this case, which the AIDS Legal Clinic at the University of Maryland School of Law handled, see infra part IV.A.


3. The Orphan Project is supported by research grants from a variety of private foundations, including the Rockefeller Brothers Fund, the Robert Woods Johnson Foundation, and the American Foundation for AIDS Research. It is based in New York
the year 2000, more than 125,000 children in the United States will have lost their mothers to AIDS. The majority of these children are from poor families where assistance will be necessary during the course of a parent's illness if these parents are to continue as primary caretakers. There is also an urgent need to ensure these children a smooth transition to a new home following the death of their parents.

In recognition of the plight of these families, standby guardianship statutes have been enacted in several states. These statutes enable parents to designate a guardian who is authorized to care for their children in the event that illness renders the parent unable to do so. Standby guardianship statutes are designed primarily to address situations in which single parents are suffering from terminal illnesses and desire the right to plan for the future of their children following their deaths.

While these statutes appear to be an excellent step for allowing families to plan for the future of their children, barriers to the appropriate implementation of standby guardianship exist. Thus far, standby guardianship statutes have received ambivalent support from departments of social services and foster care networks because they represent a dramatic departure from the historical


5. Although there are also many HIV-positive fathers who are the primary caretakers of their children, for the purposes of the Article, I assume that the mother is the custodial parent, which is true in the majority of cases.

6. See infra notes 14-19 and accompanying text.

7. Standby guardianship statutes are, of course, also available and useful to middle- and upper-middle-class families. However, they are being enacted as a response to the impact of AIDS on low-income families.
treatment of poor families by the child welfare system.\textsuperscript{8} Tradition-
ally, when poor parents become ill, their children are placed with
foster care agencies, and the parents lose much control over their
children’s future.\textsuperscript{9} Many agencies have misgivings about standby
guardianship since standby guardianship statutes provide that
decision-making authority ultimately rests with poor, HIV-positive
individuals.

While in some situations, these misgivings may be warranted,
too often courts, agencies, and social workers unjustly label poor,
HIV-positive parents as bad or incapable, and disregard their roles
in planning for their children’s futures. For example, children are
often removed from their mothers because of the family’s lack of
suitable housing. The agency that removed the children makes no
meaningful effort to assist the mother in finding new housing.
Courts and social services agencies may presume, often incorrectly,
that the mother is a drug user. In addition, they often assume that
an HIV-positive parent is likely to die quickly, and as a result, that
the children will be better off if placed elsewhere. When such
intervention occurs, an ill parent typically is not offered any
meaningful involvement in planning for the future of her children.
Instead, this parent is often forced to comply with numerous
recommendations from the child welfare agency before her children
may be returned.\textsuperscript{10} Depriving a parent of the ability to plan for
her children’s future is in direct conflict with notions of family
autonomy and parental choice that are respected in the case of
middle-class families.\textsuperscript{11} There is no justification for a double
standard for poor, single-parent families. The child welfare system
is not an appropriate or effective forum to resolve issues regarding
parents suffering from terminal illnesses.

\textsuperscript{8} Cf. Marsha Garrison, \textit{Child Welfare Decisionmaking: In Search of the Least Drastic
Alternative}, 75 GEO. L.J. 1745, 1809 (1987) (discussing the minimum intervention perspective
with regard to child welfare decision making and its incongruity with the treatment of low-
income parents involved in the child welfare system).

\textsuperscript{9} See id. at 1809 (stating that parents who voluntarily place their children with child
welfare agencies often lose legal custody of their children as well as the right to be consulted
about decisions concerning the child’s care).

\textsuperscript{10} See infra part III.A.

\textsuperscript{11} See Garrison, supra note 8, at 1809 (“Parents with resources to obtain help without
state aid have been permitted to choose the type of care their child receives without
qualification. . . . These parents lose no legal rights, they may continue to direct the child’s
care and upbringing, and, except in extraordinary circumstances, they may also regain
physical custody of the child upon demand.”).
Standby guardianship statutes offer an alternative for meeting the needs of terminally ill parents, the children impacted by their parent's illness, and the prospective guardians for these children. However, for standby guardianship to succeed, courts and social services agencies must be willing to accord poor parents a degree of autonomy that the foster care system has denied them in the past.

The closest existing analogy to standby guardianship is testamentary guardianship, in which parents select their children's custodian by will.\textsuperscript{12} This means of selecting a guardian has been used primarily by middle- and upper-class parents to plan for the placement of their children following their deaths.\textsuperscript{13} Guardianship appointments under testamentary guardianship have historically been implemented with minimal, if any, review of the parental appointment. A similar approach is appropriate in the standby context. Custodial parents are usually best suited to make decisions regarding future guardianship of their children because of their knowledge of their children and understanding of their children's relationship with the potential standby guardian. As a result, custodial parents are in the best position to facilitate the transition to the new caretaker. Standby guardianship can only be implemented successfully if poor parents are given the same opportunity as middle- and upper-class parents to make decisions regarding the placement of their children without extensive review of this guardianship appointment.

Yet, despite the need for autonomy in making these guardianship decisions, parents hoping to utilize standby guardianship statutes will require some assistance. For example, parents will often be unaware of their legal options when they become ill and unable to care for their children unless some effort to inform them is made. Consequently, parents should be advised of the choices available to them, and offered emotional support in making the difficult decision to appoint a standby guardian. While not every parent will be able to deal effectively with the decision to appoint a standby guardian, many will if given the appropriate tools.

Furthermore, standby guardians will require financial assistance to enable them to care for their new dependents. The responsibili-

\textsuperscript{12} See infra part II.B.

\textsuperscript{13} Low-income parents seldom execute wills because wills are thought of primarily as a way to distribute property.
ty of caring for additional children is a major commitment which will not be possible for many families without some form of financial assistance. Although the prospect of offering financial support may appear costly, it is much less expensive than the alternative: caring for orphaned children through the foster care system.

Standby guardianship statutes represent an innovative approach to confronting the problems of poor, single parents suffering from AIDS. As the AIDS epidemic continues to grow, these parents must be provided with choices regarding the futures of their children. Standby guardianship offers an alternative to state intervention in this arena. This Article analyzes the need for standby guardianship statutes as a response to the inability and inappropriateness of the current system in dealing with the situations of terminally ill and severely disabled parents. Part II explains the recent enactment and basic provisions of standby guardianship statutes. Part III discusses the historic treatment of poor families by the child welfare system and other professionals involved in the care of children. Using a case example from the AIDS Legal Clinic at the University of Maryland School of Law, Part IV illustrates the numerous barriers encountered by poor parents suffering from AIDS in attempting to plan for their children’s futures. Part V addresses the notion of parental autonomy and how standby guardianship statutes protect our traditional belief that decision-making power with respect to children’s welfare should rest with the family. Part VI examines the benefits that standby guardianship statutes confer upon children impacted by AIDS by providing them with continuity and stability. Finally, Part VII analyzes the issues affecting the successful implementation of standby guardianship statutes.

II. Standby Guardianship Statutes

A. The Basic Framework

New York, with one of the largest populations of women suffering from AIDS in the United States, was the first state in the nation to enact a standby guardianship statute. Illinois and

Maryland, also major centers of AIDS cases among women, quickly followed suit. Similar legislation recently has been passed in California, Connecticut, Florida, New Jersey, and North Carolina, and bills are pending in a number of other jurisdictions.

In general, standby guardianship statutes provide that parents who are at a substantial risk of becoming ill or disabled within a limited time period may nominate a “standby guardian” to care for their children at the point when they become too ill or disabled to care for them. The standby guardian has concurrent authority with the parent. Thus, parents do not relinquish any of their authority, but instead share it with the guardian. Furthermore, if the parents choose to end the standby’s authority, they may do so.

Standby guardianship statutes are necessary because testamentary guardianship statutes take effect only upon the parent’s death. Prior to the enactment of standby guardianship statutes, if parents wished to formally grant another person parental authority over their children while they were still living, they would be forced to relinquish their own parental authority. Traditionally, the law has viewed parenting as an all-or-nothing proposition. From a legal standpoint, parents are not able to share their authority or responsibility with non-legal parents, although in practice this often occurs. For example, grandparents and significant others often play a substantial, although not legally recognized,

16. See HIV/AIDS SURVEILLANCE REPORT, supra note 14, at 18 (showing 663 female adult and adolescent AIDS cases in Maryland and 460 in Illinois reported between July 1994 and June 1995).
20. In addition, most testamentary guardianship statutes provide that a “surviving” parent may execute a will. E.g., KY. REV. STAT. ANN. § 387.040 (Baldwin 1995); N.J. REV. STAT. ANN. § 3B:12-15 (West 1983). If there is a living, though uninvolved parent, as is frequently the case in the context of families impacted by HIV, the statute technically is unavailable.
21. Although a “durable power of attorney for decision making for children” exists to try to assist parents in delegating authority to their family or friends, this is not explicitly authorized by statute. As a consequence, schools and medical providers might not honor these documents.
role in caring for children. The concept of standby guardianship is unique in that it permits parents to receive assistance to care for their children without depriving them of custody of the child. Thus, the all-or-nothing view of parenting is slowly being modified to conform with reality.\textsuperscript{22}

For a parent suffering from a serious illness or disabling condition, the flexibility of the "standby" notion is essential.\textsuperscript{23} Often there are times when the parent is temporarily unable to function, and the standby guardian can step in. When and if these parents then recover, they can resume their parenting function without court involvement.

In many cases, these statutes simply authorize legal recognition of an already existing situation. Many parents who have become ill with AIDS turn to other family members for assistance in caring for their children.\textsuperscript{24} Others seek the assistance of a friend or neighbor. Standby guardianship statutes give these extended family members or friends authority to make decisions affecting the welfare of the children, including such things as enrolling children in school or making decisions about medical treatment for the children.

\textbf{B. Standby Statutes, Testamentary Guardianship, and the Appropriate Standard of Review}

Testamentary guardianship is currently the closest analogy to standby guardianship. Testamentary guardianship historically has

\footnotesize{\textsuperscript{22} The current trend towards permitting open adoption in cases in which birth parents and adoptive parents agree to adoption is another example of the recognition that a child may benefit from having multiple parental figures in her life. The historical model of parenting does not meet the reality of many of today's families (if it ever did), and the law must change to meet these realities. See Nancy Polikoff, \textit{This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families}, 78 GEO. L.J. 459, 469-82 (1990). The law's historical insistence that each child must have two parents of the opposite sex, no more and no less, does a great disservice to children and their families. See Katherine T. Bartlett, \textit{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); see also Mary L. Shanley, \textit{Unwed Fathers' Rights, Adoption and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy}, 95 COLUM. L. REV. 60 (1995).


\textsuperscript{24} See Waysdorf, supra note 4, at 177 ("Increasingly, mothers with AIDS rely on their own mothers, aunts and other, usually elderly, relatives for support and caretaking. These mothers usually prefer that their relatives and close family friends care for their children when they are no longer able to do so.").}
been implemented with minimal, if any, review of parental appointments of guardians. This mechanism has been used primarily by middle- and upper-class parents who execute wills, which are probated through the Orphan's Court division. Maryland's testamentary guardianship statute, for example, provides that surviving parents may appoint a testamentary guardian for their children. Under the Maryland statute, such a guardian "need not be approved by or qualify in any court." Generally, meaningful review of a testamentary guardianship appointment only occurs if a relative contests the parent's choice of guardian. Courts differ at that point in determining what standard of review is appropriate.

Both testamentary and standby guardianship statutes should be subject to the same standard of review. Deference to the parent's appointment is appropriate, because that parent typically will be the person with the most knowledge and control to facilitate a good choice. For poor families, the question of who should be the primary decision maker for the children usually does not pit family members against each other. Rather, poor families often must challenge state intervention to retain control over this decision. In most cases, the family will be better equipped to make the appropriate decision regarding placement for these children. Therefore, the parent's appointment should be honored unless there is evidence that the parent's choice would in fact be detrimental to the child.

III. The Historic Failure To Respect the Autonomy of Poor Families

For the notion of standby guardianship to work effectively, both social workers and the courts must be prepared to defer to plans prepared by poor, HIV-positive parents for their children. Under some standby guardianship statutes, the individual chosen by the parent to act as the guardian already will have acted in this capacity for months before any judicial review occurs. If a court

26. *Id.*
28. Maryland's new standby guardianship statute provides that a parent may appoint a standby guardian and that the guardian may begin to function when a physician confirms that the parent is debilitated and unable to care for her children. Court confirmation need not occur for up to six months thereafter. *See Md. Code Ann., Est. & Trusts* § 13-901 to -908
later were to step in and substitute its judgment for that of the deceased parent, the results could be devastating for the children involved. Thus, a major change in the current attitude towards low-income parents is needed to facilitate the use of standby guardianship.

Despite notions of respect for family autonomy, the state has intervened repeatedly in the lives of poor families. Beginning with the Poor Laws in England, children of poor parents have been removed from their families without parental consent. Even today, abuse and neglect laws, which allegedly were enacted to protect all children from abuse or neglect, are enforced principally against poor parents. Thus, the values of family autonomy, privacy, and parental authority that govern elsewhere in our legal system have been essentially ignored by the child welfare system when dealing with poor families.

Poor families, and particularly single mothers, are more likely than middle-class parents to be enmeshed in the child welfare system for several reasons. First, poor families are more often the recipients of public benefits and, thus, are more often in regular contact with social workers who have the opportunity to scrutinize

(1994).

29. See Martin Guggenheim, The Political and Legal Implication of the Psychological Parenting Theory, 12 N.Y.U. REV. L. & SOC. CHANGE 549 (1983-84); Garrison, supra note 8, at 1750. Like today's child welfare laws, the Poor Laws allegedly served a "public need" by placing children in apprenticeship programs until they reached the age of majority. See id. at 1750.


A study of black children in foster care in five cities, including Detroit, Houston, Miami, New York, and Seattle, found that Aid to Families with Dependent Children (AFDC) was the principal source of income for 65% of these children's birth families. No income information was available for 30% of the families. NATIONAL BLACK CHILD DEV. INST., WHO WILL CARE WHEN PARENTS CAN'T? A STUDY OF BLACK CHILDREN IN FOSTER CARE (1989) [hereinafter STUDY OF BLACK CHILDREN IN FOSTER CARE]. The typical household in the study was headed by a young mother. The "typical mother in the study was black, single, under 30, had two or more children, less than a high school education, little or no experience, and AFDC as the primary source of income at the time of placement." Id.

31. Garrison, supra note 8, at 1768-69. Garrison describes how, with the exception of the child welfare system, "our legal tradition has generally accepted the premise that parents have a paramount claim to the care and custody of their minor children in all but exceptional circumstances." Id. at 1769.
their living situations.\textsuperscript{32} Often, these social workers apply their own middle-class value systems and find the family living situation among poor families inadequate.

Second, physicians, social workers, and other professionals are reluctant to report neglect or abuse by middle- and upper-class families except in clear-cut cases. These individuals are reluctant to report people they perceive as similar to themselves and may not wish to disrupt their relationships with paying clients.\textsuperscript{33} They also may fear retaliation by the family, especially if the suspected abuse or neglect is not confirmed. For these middle- and upper-class families, child care professionals are more likely to pursue other avenues, such as referring family members for counseling, when they suspect abuse or neglect. However, no such reluctance to report exists where poor families are concerned.\textsuperscript{34} For example, health care professionals are much more likely to report drug use by poor, black women than they are to report similar drug patterns by white, wealthy patients.\textsuperscript{35} A recent study documents this bias in the reporting of pregnant women and their drug use by medical providers in Florida.\textsuperscript{36}

Finally, poor families are more likely to be involved in the child welfare system because when crisis hits, poor families often have limited resources upon which to rely. Loss of a job quickly leads to loss of a home. Children are removed from their parents because of the parents' inability to provide adequate shelter.\textsuperscript{37} The preferable response to such a crisis would be to assist the

\textsuperscript{32} "Because welfare families are subject to supervision by social workers, instances of perceived neglect are more likely to be reported to governmental authorities than neglect on the part of more affluent parents." Dorothy E. Roberts, \textit{Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy}, 104 HARV. L. REV. 1419, 1440-41 (1991). Roberts also describes how black children are more likely to be removed by the child welfare system, due to the system's lack of respect for and understanding of the role of the extended family in the black community. \textit{Id.} at 1441.

\textsuperscript{33} See Ira J. Chasnoff et al., \textit{The Prevalence of Illicit-Drug Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida}, 322 NEW ENG. J. MED. 1202, 1205-06 (1990).


\textsuperscript{35} Roberts, \textit{supra} note 32, at 1433.

\textsuperscript{36} Chasnoff et al., \textit{supra} note 33.

\textsuperscript{37} Homelessness was cited as a factor in 11\% of cases in which the child was placed in foster care. Inadequate shelter was cited in an additional 30\% of cases. \textit{STUDY OF BLACK CHILDREN IN FOSTER CARE, supra} note 22.
family in finding shelter, but unfortunately, this is not how the current system works.  

A. Disparate Treatment of Low-Income Parents

If a doctor disagrees with a middle-class parent’s decision about medical care for a child, and fears the child’s life is endangered, the doctor is likely to talk with counsel for the hospital and seek court authority to override the parent’s decision. The child remains in the legal custody of the parent, and the court focuses on the narrow legal issue of appropriate medical care for the child.  

However, in the case of a poor parent’s decision concerning medical care for a child, that doctor is much more likely to contact Protective Services (the agency which enforces abuse and neglect statutes), and request its intervention. Typically, if the doctor reports that the parent’s failure to agree to certain medical care will endanger the child, the child will be removed from the parent’s custody, and placed in foster care pending the outcome of legal proceedings.
When a child is placed in foster care, regardless of whether the placement results from a charge of abuse or neglect against a parent or from a parent's illness and inability to care for the child, the parent loses much control over subsequent events. For example, the parent relinquishes the ability to determine when the child will be returned and is not consulted about decisions affecting the child's welfare. Communication between parent and foster

43. See Duchesne v. Sugerman, 566 F.2d 817 (2d Cir. 1977) (discussing a mother of two children, placed by an agency when the mother was hospitalized, who spent years attempting to regain custody); Matter of Sajivini K., 391 N.E.2d 1316 (N.Y. 1979) (concerning a mother who voluntarily placed child for financial reasons, but contributed to the child's support and visited regularly, and who was unable to regain custody for nine years).

Although problems such as these theoretically were addressed by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620-28 (1995), and the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101-06 (1995), the problems continue. In a recent class action brought on behalf of foster children against the District of Columbia's Department of Human Services, the court concluded "that the CFSD has consistently failed to comply with the statutory time limits regarding voluntary and emergency care. The result has been a state of limbo for these children who, while in emergency care do not have any case plans prepared on their behalf." LaShawn A. v. Dixon, 762 F. Supp. 959, 971 (D. D.C. 1991). The court went on to note that "the average stay for children in the District's foster care system is just under five years — a third of their childhoods." Id. at 973.

Despite litigation, the District of Columbia has failed to improve its performance and implement court ordered changes. After four years of attempting to get the city into compliance, Federal Judge Thomas F. Hogan finally seized control of the agency from the District of Columbia government. Toni Locy, Federal Court Seizes Control of D.C. Child Welfare System, WASH. POST, May 23, 1995, at A1; see also Jeanine B. v. Thompson, 877 F. Supp. 1268 (E.D. Wis. 1995) (pertaining to a class action alleging failure of Milwaukee County Foster Care System to provide adequate services to children and their families to allow children to return home); Baby Neal v. Casey, 43 F.3d 48 (3d Cir. 1994) (alleging a variety of systemic problems with the child welfare system operated by Philadelphia's Department of Human Services, including failure to make reasonable efforts to return children to their homes as quickly as possible, as mandated by the Adoption Assistance and Child Welfare Act of 1980).

44. Marsha Garrison explains:

When a child entered foster care, whether by court order or voluntary placement, the parent was required to cede legal custody — the right to decide where the child lives and the kind of care he will receive — to the state's foster care agency. The agency thereafter decided where the child would reside and how long he would remain there; the parent retained no right to be consulted on decisions about the child's care or, typically, to regain custody without agency or court approval. This usurpation of the parental role was invariable. Parents who voluntarily placed their children, no matter what the reason for placement or their parenting ability, lost custody rights just like parents who had been found unfit.

Garrison, supra note 8, at 1755-56. Even though in theory a parent's rights may not be terminated without due process, Lassiter v. Department of Social Services, 452 U.S. 18 (1981), once a child enters foster care, regardless of the reason, the parent effectively loses control. Although the parent retains some rights, such as the right to make medical decisions, the agency will often ask the parent to assign that right to them, and if the parent
parent is typically discouraged. Agencies rarely attempt to facilitate meaningful visits between parent and child.\textsuperscript{45} The normal visit is often a two-hour meeting at the Department of Social Services (DSS). This visit takes place once a week at most, but often occurs less frequently.\textsuperscript{46} The foster care system usually presumes it is dealing with a bad, or at best, an inadequate parent, and accords that parent no respect or authority.\textsuperscript{47}

The families that should benefit most by standby guardianship statutes are the same families that have historically experienced frequent, and often unhelpful, intervention by the child welfare system.\textsuperscript{48} This "bad parent" presumption occurs even more

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\item refuses, will ask the court to grant them that authority. If the parent should die while the child is in custody, it is most often the foster care agency, not the mother's wishes, that will dictate where the child is placed.
\item \textsuperscript{46} A consent decree entered into in \textit{L.J. v. Massinga}, 699 F. Supp. 508, 521 (D. Md. 1988), \textit{aff'd}, 838 F.2d 118 (4th Cir. 1988), \textit{cert. denied}, 488 U.S. 1018 (1989), provided that "[i]n all cases in which the goal is to return a foster child to his or her biological home, defendants shall make reasonable efforts to facilitate weekly visits between the parent and child, unless the juvenile court orders otherwise . . . ."
\item In \textit{Winston v. Children and Youth Services}, 948 F.2d 1380 (3d Cir. 1991), \textit{cert. denied}, 504 U.S. 956 (1992), the plaintiffs challenged the visitation policy and practice of the Children and Youth Services of Delaware County as a violation of the Adoption Assistance and Child Welfare Acts. The policy provided for a one-hour visit every two weeks, as a minimum for all cases. \textit{Id.} at 1388. The court found that this was not a violation of federal law.
\item \textsuperscript{47} See Martha L. Fineman, \textit{Images of Mothers in Poverty Discourses}, 1991 \textit{Duke L.J.} 274 (1991). Fineman describes how poor single mothers, if they are not single as a result of death (or perhaps divorce) are deemed "bad" mothers. \textit{Id. at} 282, 283. Dorothy Roberts describes the myth of the "bad" black woman that developed during slavery. Slave women were not permitted to function as nurturing mothers and companions to their fathers or husbands. They were often raped by their owners and compelled to bear children from whom they were later separated. The myth of the loose black woman has been deliberately perpetuated until today. Roberts, \textit{supra} note 32, at 1438-39.
\item Abuses by juvenile court judges who were inappropriately interfering with poor families were recognized by the National Advisory Committee for Juvenile Justice and Delinquency Prevention, which responded with the following guidance for judges:
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\item A presumption for parental autonomy conforms with our legal and political commitments to privacy, freedom of religion, and diversity of ideas. When coercive intervention is expanded, these important values may be eroded. Extensive state involvement in child-rearing may jeopardize the important diversity that is fostered by allowing parents to raise children in accordance with their own particular feelings and belief.
\end{itemize}
\item \textbf{National Advisory Comm. For Juvenile Justice and Delinquency Prevention, Standards for the Admin. of Juvenile Justice} (1980).
\end{itemize}
frequently where HIV-positive parents are concerned.\textsuperscript{49} Society immediately presumes that these parents have acted irresponsibly or are drug users, and therefore are incapable of parenting. In addition, it is often assumed that these parents are likely to die soon, and therefore, their roles in their children's lives are insignificant. As a consequence, their wishes as parents are accorded little, if any, respect.\textsuperscript{50} These parents have frequent contact with social workers from various state agencies due to both their poverty and their HIV disease. As a result, their parenting abilities, living situation, and so forth are subjected to much closer scrutiny than the average middle-class parent.

\textbf{B. Illustrations}

The AIDS Legal Clinic at the University of Maryland School of Law has encountered numerous cases in which Protective Services workers and the courts have excluded HIV-positive parents from participating in decisions affecting the welfare of their children to the detriment of all involved. In one such AIDS Clinic case, a mother threatened to remove her son from the hospital where he was being treated because the hospital placed a "blood and body fluids precautions" sign on the door. She felt that this was a breach of both her and her son's confidentiality.\textsuperscript{51} A report was made by a physician to Protective Services that the mother was threatening to remove her child against medical advice, and that she had been erratic and unreliable in bringing him to clinic appointments. No meaningful attempt was made to meet with the parent and discuss underlying concerns prior to the filing of the report.

At the next level, rather than investigating the underlying problems, the Protective Services worker merely accepted the physician's report and removed the child. Later it became clear that the mother was having a difficult time bringing her child to the medical clinic because it was a painful reminder to her of her son's


\textsuperscript{50} Because of its historic lack of respect for parents, many parents are very reluctant to turn to the foster care system when they need assistance. See, e.g., \textit{Mother Dying of AIDS Struggles to Find Home for Her Son}, BALT. SUN, Jan. 15, 1993, at 1; \textit{Woman Ill with AIDS Seeks Home for Her Child}, BALT. SUN, Mar. 9, 1993, at 1.

\textsuperscript{51} The mother also had a history of being difficult to deal with in the hospital's pediatric clinic.
illness, for which she felt responsible. What was needed was intervention by an empathetic counselor, not removal of the woman's child. The child had not been in danger, and removal was clearly unwarranted.\footnote{In another such case handled by the AIDS clinic, a mother had reluctantly agreed to enroll her daughter in an experimental drug protocol. When she failed to bring the child in consistently for her appointments, a Protective Services report was made, and the child was removed. These do not appear to be isolated incidents. Fortunately, in both of these cases sympathetic family members took care of the children until the clinic was able to persuade the court to return them to the care of their mothers. But the removal and accompanying trauma to both mother and child could have been avoided.}

In another AIDS Clinic case, an HIV-positive mother voluntarily brought her eight-year-old child to the hospital for evaluation when he began acting out, and she was having difficulty controlling his behavior. Upon evaluation, it appeared that his actions stemmed at least in part from his knowledge of his mother’s HIV status and his fear that she would die. After thirty days of hospitalization, the treating psychiatrist recommended a longer placement at a residential treatment center for boys. The mother objected, and the psychiatrist called Protective Services who intervened, and placed the child against the mother’s wishes. Although the mother acted responsibly when she initially had the child evaluated, the psychiatrist and Protective Services refused to honor her wish to have the child returned to the home.

The AIDS Legal Clinic at the University of Maryland School of Law represented the mother, but it was over a year until the child was returned to his home. This delay was due primarily to the actions of Protective Services which continually raised new hurdles for the mother to overcome to have her child returned. For example, the agency required the mother to complete parenting classes, attend individual therapy, and improve her housing situation. In the interim, Protective Services made little or no effort to facilitate visitation between the mother and her son, despite the child’s persistent requests to go home and his desire for holiday visits. There were no allegations of abuse or neglect in this case; the sole problem was the mother's difficulty controlling her son's erratic behavior.

Removal of the child was extraordinarily damaging in this context. Part of the child’s fear centered around losing his mother. Legal scholars have similarly observed that the system removes
children from their homes without sufficiently exhausting other alternatives, and leaves them to languish in foster care too long, resulting in more harm for the child.\textsuperscript{53}

The Adoption Assistance and Child Welfare Act of 1980\textsuperscript{54} was intended to address these systemic problems. Unfortunately, it has failed to do so. This failure is in part due to the Act's lack of an enforcement mechanism capable of compelling state agencies to comply with its provisions. In addition, the federal funding scheme encourages placement of children in foster care, as opposed to providing services to the family at home.\textsuperscript{55} As a result, there has been an increase in the need for foster care.\textsuperscript{56}

IV. Lack of Respect for Poor Families Acts as a Barrier to the Successful Implementation of Standby Guardianship

The cases described above are just a few examples of the child welfare and judicial system's lack of respect for the wishes and parenting skills of HIV-positive parents. The concern is that this lack of respect will prevent the effective implementation of the new standby guardianship statutes. As the following case study illustrates, this has already occurred in cases involving testamentary guardianship statutes.

A. Case Study: Theresa Morgan

In 1990, the AIDS Legal Clinic at the University of Maryland School of Law was contacted by a client named Theresa Morgan.\textsuperscript{57} She was a recovering drug user who was HIV positive and symptomatic, but had not yet been diagnosed with AIDS. Theresa had two older children, Brandon and Kimberly, ages five and eight, living with her. She placed two younger children in foster care at

\begin{itemize}
\item \textsuperscript{54} Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).
\item \textsuperscript{55} Roger J.R. Levesque, \textit{The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint}, 6 MD. J. OF CONTEMPL. LEGAL ISSUES 1, 18-20 (1995).
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Names have been changed to protect client confidentiality.
\end{itemize}
birth. One of those children, Kevin, died of AIDS at the age of three and a half while with his foster family. The other child, Angela, was healthy, and remained with a foster mother who hoped to adopt her with Theresa's support and encouragement. Despite discouragement by DSS, the foster mother, Diane Peters, and Theresa became friends. As Theresa became more ill, the foster mother assisted her with the two older children, transporting them to school, taking them occasionally on weekends, etc. Ultimately, Theresa and Diane agreed that upon Theresa's death, the older children would also be placed with Diane, and eventually adopted by her. As such, Theresa executed a will appointing Diane as guardian of the two older children. In addition, Theresa and Diane signed an open adoption agreement, which provided Theresa ongoing visitation with her youngest daughter, even after the adoption became final. The agreement further provided that Theresa's extended family should have ongoing visits with all of the children, even after Theresa's death.

Theresa explained these arrangements to her children and encouraged their developing relationship with Diane. Upon Theresa's death, Diane assumed physical custody of the two oldest children, pursuant to Theresa's will. No one in Theresa's family expressed any interest in caring for the children at that time.

In the meantime, a study of Diane's home had been completed by the DSS, which approved her home as an adoptive placement. Termination of the father's rights occurred with regard to the youngest child in March 1993. Thus, the path was clear to finalize the child's adoption by Diane, who had already received approval by DSS.

However, when DSS learned of Theresa's death, an attorney for the Department became concerned about whether the two older children were "legally protected." The DSS attorney gave no credence to the will that Theresa had executed. Through a social worker, the DSS attorney asked Diane to consent to legal commitment of the two older children to DSS with continued placement with Diane. Diane was told that the Department would then assist her in adopting these two children as well. In the meantime, Diane would qualify for foster care payments. Not surprisingly, Diane agreed.

Shortly thereafter, paternal relatives contacted DSS to inquire into the whereabouts of Angela, the youngest child, who had been freed for adoption. A paternal aunt, whom the child had never
met, was interested in adopting her. When DSS explained that keeping the children together as a family unit was a priority, the paternal relatives indicated their interest in adopting all three children, including Brandon, who had a different father and had no legal or emotional relationship to this family. The paternal relatives had no contact with the children for many years, and only limited contact for a period of months when the two older children were very young.

At a review hearing on the status of the older children’s placement, the judge permitted the paternal relatives to appear and express their desires with regard to custody. The judge permitted Diane Peters, the foster mother, to intervene in the proceeding, but denied her motion to rescind commitment of the two older children to DSS so that she might continue to pursue adoption independently. The judge refused to recognize that the deceased mother, Theresa Morgan, had appointed a testamentary guardian for her children, and that the guardian already had been acting in that role for several months. The court rescinded limited guardianship in the foster mother for medical and psychiatric treatment and out-of-state travel, and transferred this guardianship to DSS. The court then ordered monthly visitation for both Brandon and Kimberly with the paternal relatives. Finally, the foster mother was instructed not to discuss future custody plans with the children, despite counsel’s argument that the children were upset by the uncertainty that the visits with paternal relatives were creating. The children were willing to engage in these visits, but wanted assurances that the new home, which they had settled into following their mother’s death over a year before, would not be disturbed. The court’s intention appeared to be to facilitate the development of a relationship with the children’s paternal relatives with a future change in custody as a likely possibility, pursuant to DSS’s suggestion.

The court refused to recognize the will Theresa Morgan had executed appointing Diane Peters guardian of her children. Neither the deceased mother’s wishes, nor her valiant attempts to provide a smooth transition to a new home for her children, were seriously considered by the court. Nor was there any recognition of the children’s desire to remain together in the home of their foster parent.

A further complication in this situation, which undoubtedly impacted on the judge’s decision, was the fact that the foster
mother was Caucasian, while the children and the paternal relatives were African American. This issue was not directly discussed, but it was clearly a concern among the parties. Positions broke down entirely on racial grounds as Caucasian advocates supported guardianship by the foster mother, while African-American advocates favored exploring the award of custody to the paternal relatives. This racial division occurred regardless of whom the individuals represented.

Part of the irony of this case is that the court recognized that the extended family had no independent legal standing to be heard in this situation. They were permitted to be heard because of the father's wishes that they be considered (even though his paternal rights as to the youngest child had been terminated due to his abandonment of the child), and because of the policy of DSS to explore relative placements prior to placing a child in a non-relative foster home.

58. The National Association of Black Social Workers (NABSW) is vehemently opposed to transracial adoption. NATIONAL ASS'N OF BLACK SOC. WORKERS, PRESERVING AFRICAN AMERICAN FAMILIES (Apr. 1991) (paper on file with author). The NABSW takes the position that transracial adoption is not only harmful to children and to the African-American community, but is also unnecessary. The group argues that African-American children are improperly removed from their homes due to poverty, a concern that could and should be remedied by supplying adequate resources to the families. If existing African-American families were strengthened and supported, the need for adoption and foster care would decrease. Additionally, the association maintains that qualifications for adoptive families are unduly restrictive and screen out many African Americans, such as those who are over the age of 55 or are single, who would make fine adoptive parents. Finally, the NABSW argues that transracial adoptions contribute to the erosion of the black community. The association believes that African-American children must be raised by African-American families where "they belong physically, psychologically, and culturally in order that they receive the total sense of themselves and develop a secure projection of their future." Id. However, the NABSW position paper does not address the issue of the right of terminally ill African-American parents to determine the future guardian of their children. The concern about the state improperly removing children is not present here.


59. For example, the attorney for DSS, who was Caucasian, was inclined to allow Diane to proceed with her plan to adopt all of the children. However, she was persuaded by the social worker involved, an African American, to support the paternal aunt's intervention.

60. Because the Maryland Code speaks only of relative placements or foster care, DSS takes the position that non-relative placements are not an option.
If the paternal relatives had proceeded in Orphan’s Court in a guardianship proceeding to challenge the mother’s appointment, it is unlikely that they would have received anything more than a perfunctory hearing. They had no relationship with any of the children, and the children were doing well in their new home. Diane was the only parent the youngest child, Angela, had ever known. The father’s paternal rights as to Angela had been terminated. Traditionally, this would result in the termination of any relationship with the extended family as well.61

Despite the court’s actions, Maryland’s testamentary guardian statute gives a parent an absolute right to appoint a guardian. The statute provides that “unless prohibited by agreement or court order, the surviving parent of a minor may appoint by will one or more guardians and successor guardians of the person of an unmarried minor. The guardian need not be approved by or qualify in any court.”62 From the time Theresa executed her will until the time of her death, she had full legal and physical custody. There was no court order in effect regarding either Brandon or Kimberly. Brandon’s father was deceased. Kimberly’s father was living, but had no contact with her for many years. However, even when there is a surviving father, as with Kimberly, Maryland courts have given due consideration to a custodial mother’s wishes as expressed in her will.63

Nevertheless, because Theresa was a poor, black, single parent, and a recovering drug user with AIDS, the juvenile court chose to disregard Theresa’s expressed wishes and her plan for her children, which already had been implemented and in operation for over a year. The claimed authority of DSS involvement was that the children were not “legally protected.” However, by virtue of Theresa’s will, the children had a legal guardian. If this same reasoning were applied across the board, all children who have lost both parents should be declared Children in Need of Assistance (CINA) immediately at the time of their parents’ death.64 This

61. This is another area in which flexibility is needed. Family law’s tendency to require rigid role definitions, e.g., “either you maintain physical custody of this child or your rights will be terminated,” does not address the realities faced by poor families.
64. The court also appeared to have justified its intervention because there had been an Order of Protective Supervision in 1990, placing Theresa and her children under the watchful eye of DSS. This was a result of Theresa’s testing positive for cocaine at the time of Angela’s birth. However, Theresa entered drug treatment in 1991, and did not, according
does not occur where middle-class children are concerned; the will is probated, and the guardian appointment is confirmed more or less automatically.65

B. Outcome

Ultimately, DSS recommended that all three children be placed with their paternal aunt. The principal concern appeared to be the importance of African-American children living with an African-American family. However, the attorney for the foster mother introduced a psychiatrist who evaluated all three children in their foster placement. She found that they had adjusted well to this new home and wished to remain there. As a result, the judge who heard the trial on the merits rejected DSS's recommendations and allowed the children to remain with their foster mother, who then adopted all three children. However, the children were put through needless trauma and uncertainty, particularly at a time when they needed stability and support to grieve the death of their mother.

Unfortunately, DSS and the first judge's failure to give any serious consideration to Theresa's plan for her children is not unusual. This could occur in a variety of different ways, such as unnecessary Protective Services intervention when the parent has already established a plan for her children's future under the standby guardianship statute, or by the courts' disregard of a parent's plan after her death. Substantial education is necessary to persuade judges, attorneys, and social workers to defer to a parent's appointment, unless good cause exists for not doing so. Presumptions about an individual's parenting ability should not be made based on economic status or the presence of HIV. Parents should be encouraged to make plans for their children, which will benefit those children by reducing the need for abrupt removal and placement in foster care.

V. Standby Guardianship Protects Traditional Notions of Parental Autonomy

Traditionally, parental decisions with respect to the welfare of their children have been given great deference. Our society embraces the principle that families, as opposed to the state, are best suited to raise children.66 Because of our cultural diversity, families differ in their manner of raising children, the values they stress, and the importance of extended versus nuclear family. There is no societal consensus about the best way to raise a child or what disciplinary methods parents should use. State intervention into the family situation is typically limited to the contexts of abuse and neglect, "abandonment, child behavior problems, a parent's mental or physical illness . . .,"67 and medical decision making when the life of a child may be directly endangered.

With the exception of the poor, families generally are left to raise children as they see fit.68 This principle is an illustration of

66. See Francis Barry McCarthy, The Confused Constitutional Status and Meaning of Parental Rights, 22 GA. L. REV. 975 (1988). The notion of parental autonomy has constitutional dimensions. In Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), the Supreme Court stressed the importance of parental autonomy in decisions about education for their children. The Court, recognized, however, that it must balance a countervailing state interest in the child's welfare. In Prince v. Massachusetts, 321 U.S. 158 (1944), for example, the Court held that a parent's religious principles could not overcome the state's interest in protecting a child's welfare where child labor was involved. In the more recent case of Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court upheld the right of Amish families to prevent their children from continuing with public education beyond eighth grade. Only the dissent in Yoder recognized that the child had a separate interest that the Court should recognize. Id. at 241 (Douglas, J., dissenting).

Recent cases involving minors and the right to an abortion have recognized a child's separate interest. In Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976), and Bellotti v. Baird, 443 U.S. 622 (1979), the Supreme Court recognized that a child has a privacy interest separate from her parents that must be considered in the abortion context. A "mature minor" is capable of making an informed decision about whether or not to have an abortion, and her privacy must be respected.

Another important concept in Supreme Court abortion cases, including Danforth and Bellotti, is that a parent may not always make a decision in the child's best interests, and that this necessitates some review or involvement by some other authority figure. Danforth, 428 U.S. at 74; Bellotti, 443 U.S. at 647. In Parham v. J.R., 442 U.S. 584, 613-17 (1979), the Court found that review by the medical director to ascertain the necessity of committing a child to a psychiatric facility was sufficient review of parental decision making.

67. See Garrison, supra note 8, at 1749.

our society’s diversity and appears to stem from our faith in the ability of parents to know their children best and do what is best for them.69 This deference is also, in part, a result of the historical notion of children as property of their parents.70

Many testamentary guardianship statutes reflect this attitude of deference to parental decision making in the context of planning for children after the death of their parents. For example, Maryland’s testamentary guardianship statute provides that a guardian appointed in a parent’s will “need not be approved by or qualify in any court.”71 Typically, there is no substantial review of the parent’s appointment. Review usually occurs only when there is a contest, as when a grandmother seeking custody for herself challenges the parent’s appointment of another relative. A question then arises as to what standard of review should apply.

The answer varies substantially from state to state.72 Courts differ in the weight they give to the parent’s preference. Some courts will confirm the parent’s appointment, absent evidence that the appointment will be detrimental to the child.73 Others will conduct an independent review to determine what guardianship situation will be in the child’s best interest.74 These courts

72. See Annotation, Function, Power and Discretion of Court Where There Is a Testamentary Appointment of Guardian of Minor, 67 A.L.R.2d 803 (1959). There are relatively few reported cases in this area, and the courts have done only a minimal analysis of what standard should apply.
73. E.g., Ex parte McCoun, 150 P. 516 (Kan. 1915); In re Young’s Estate, 9 Alaska 158 (1937).
74. E.g., In re Walsh’s Estate, 223 P.2d 322 (Cal. Ct. App. 1950). In this case, the court refused to carry out the father’s wishes appointing his parents as guardians for his two sons. The court instead appointed the boys’ maternal grandparents on grounds that they were better able to care for children. Financial status appeared to be major consideration for the court. See also Lippincott v. Lippincott, 128 A. 254 (N.J. Eq. 1925); In re Estate of Suggs, 501 N.E.2d 307 (Ill. App. Ct. 1986) (court should consider best interest of child; all other things being equal, wish of parent prevails).

Interestingly, testamentary guardian statutes are rooted in the 19th century, an era in which married women were not treated as independent legal persons. Fathers had full custody and control over the children, even though mothers typically had primary child care responsibilities. The father was given authority to decide who should be the guardian for the children upon his death, and often the mother was excluded from this role, or conditions
consider the parent’s wishes as just one factor to be considered in the overall evaluation. As a practical matter, however, meaningful review of a middle-class parent’s testamentary appointment takes place only if another family member contests the appointment in court. In most cases, the parent’s choice is automatically upheld with minimal or no investigation.\footnote{Whether or not an investigation takes place varies from state to state. In New York, for example, investigations are routinely done in all guardianship cases to insure that the prospective guardian has not been convicted of child abuse or related offenses. In Maryland, however, no such investigation is required.}

In the context of both testamentary guardianship and standby guardianship, deference to a parent’s choice, absent evidence that it may be detrimental to the child, is the appropriate standard to apply. Parents generally have the best opportunity to develop a thorough knowledge of their children. They are most familiar with their children’s temperaments, personalities, and concerns. They also understand their children’s relationships with friends and extended family members. Consequently, the parent, rather than the court, is in the best position to determine what appointment will be in the best interests of the children.\footnote{As one court stated: No person is in a position to know as well who should have the custody of children as the surviving parent. They are his flesh and blood. He has observed them throughout their lives. By daily contact he knows their temperaments and habits, and by observation he knows those who have evidenced the greatest interest in his children, and those whose moral and spiritual values are in his judgment conducive to the best interests of his children. A judge treads on sacred ground when he overrides the directions of the deceased with reference to the custody of his children.} Additionally, custodial parents are best suited to facilitate a transition to a new caretaker. As a result, deference to those parents’ choices can provide certainty for children at a critical juncture in their lives.

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were placed on her guardianship. For example, if she remarried her guardianship would lapse and be transferred to another. Holmes v. Field, 12 Ill. 424 (1851). Application of the “best interests” standard in this context appears to have its roots, at least in part, in cases that arose out of situations in which a father appointed someone other than a child’s mother to be the guardian upon the father’s death. To avoid this unwise result, the “best interests” exception permitted them to review the merits of the father’s decision. See, e.g., Anonymous, 6 Grant. Ch. 632 (Can. 1858).

75. Whether or not an investigation takes place varies from state to state. In New York, for example, investigations are routinely done in all guardianship cases to insure that the prospective guardian has not been convicted of child abuse or related offenses. In Maryland, however, no such investigation is required.

76. As one court stated:

Comerford v. Cherry, 100 So. 2d 385, 390 (Fla. 1958).
VI. Standby Guardianship Provides Stability and Continuity for the Children Impacted by Parents Suffering from AIDS

The best interests standard utilized by the courts to determine the proper placement of children has been appropriately criticized as indeterminate and ineffective in contexts other than standby guardianship. Its application often results in prolonged and bitter disputes between parents enmeshed in custody battles. In the standby guardianship context, however, in which only one parent’s wishes are typically at issue, no justification for contradicting that parent’s plan for future care of her children exists. If we defer to the autonomous decision-making power of parents while they are raising their children, their choice of caretaker upon their deaths should be respected, absent extraordinary circumstances.

Respecting the custodial parent’s choice in the standby guardianship context is even more compelling than in the testamentary guardianship context because it is likely that the standby has begun to act as the guardian prior to the parent’s death. Existing data indicates that providing this certainty and stability for children at a time of great loss is of critical importance.

In his book *Loss: Sadness and Depression*, John Bowlby summarizes much of the work that has been done regarding children and loss. In his attempt to ascertain why some children


78. Of course, in probate a will would also be subject to the usual challenges, e.g., the testator was not competent at the time she signed it, she was subject to undue influence, etc. A standby guardianship appointment could be challenged on similar grounds.


After surveying the literature in the field, Bowlby concludes:

Amongst all those who have surveyed different groups of individuals who have lost a parent during childhood, there is now substantial agreement in regard to the enormous importance of a child’s experience after the loss. Individuals who later
develop a psychiatric disorder after the death of a parent while others do not, Bowlby identifies three factors as significant: First, the causes and circumstances of the loss, including what the child is told and the child's opportunities to inquire about the loss, are particularly important. Second, the family relationships after the loss, including whether the child remains with a surviving parent and how the relationship with that parent is affected by the loss, must be considered. Finally, relationships within the family prior to the loss are a significant factor.

Bowlby's survey of the literature of childhood bereavement concludes that the child's experience after the loss of a parent is of critical importance. Those developing a psychiatric disorder later in life are much more likely to have received deficient parental attention following their loss. Breakup of the home and frequent changes in the child's caregiver have a severe impact on those children and may result in neurotic illness or delinquent behavior. In fact, Bowlby concludes that the majority of pathological outcomes of bereavement are a result of the interaction of adverse conditions following bereavement with the mourning processes set in action by it. He indicates that discontinuities of care, temporary foster homes, and other factors have proved to be very detrimental to the child. Bowlby also indicates that there is a consensus among the experts regarding the importance of the continuity of care a child receives after the loss of a parent.

Children in families affected by HIV are likely to be at high risk in each of the categories identified by Bowlby. Often children of HIV-positive parents are not informed about the cause of their parent's illness. In other situations, the children know about the

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81. Bowlby rejects traditional theories which held that children, and even adolescents, cannot mourn due to their psychological immaturity, and that emotional problems following a parent's death are the result of "arrested development." Id. at 318.

82. See THE MENTAL HEALTH NEEDS OF WELL ADOLESCENTS IN FAMILIES WITH AIDS: A STUDY OF CLIENTS OF THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, NATIONAL INST. OF MENTAL HEALTH. One of the major problems identified by the study is that because of the stigma attached to the HIV infection, many parents never inform
illness, but it is kept a family secret. They cannot discuss the illness with others for fear of an adverse reaction due to the stigma attached to HIV. This complicates the grieving process immeasurably.

Moreover, since the majority of HIV-positive women are single parents, with the second parent absent or appearing only occasionally, the children often have no second parent to whom they can turn for support. Additionally, many of these children are being raised in families that have experienced serious problems even prior to the onset of HIV. A substantial percentage of HIV-positive mothers contract HIV through drug use. Many others contract the virus through sexual contact with a drug using male partner. Thus, we have a group of children that are already at high risk prior to the death of their parents.

Available data highlights the importance of providing a smooth transition to a new, stable home for children who lose a parent to HIV. Ideally, the new home should have a caregiver with whom the child already has developed a positive relationship. It should be a place where the child can feel comfortable discussing the loss of his or her parent, including the illness and its history, without fearing judgmental responses. The court should defer to the parent’s choice absent evidence that the choice will be detrimental to the child, and should not engage in a de novo assessment of what it deems to be in the child’s best interest. The court should consider several factors, including whether the parent had been the primary custodian in the months or years prior to his or her death. If a parent had been the primary custodian, it seems appropriate to

their children of the cause of their illness. Even those children who were aware of the cause of their parent's illness often found it impossible to share this information with others and gain much needed support. For example, in this study, adolescents in 40 families were surveyed to learn how they were coping with the news of their parent's HIV status. About 62% of those interviewed indicated that they did "have a best friend." None of these children interviewed had disclosed the fact of their parent's HIV illness to their best friend, and less than half had an opportunity to talk with a counselor about their family situation.

83. See Waysdorf, supra note 4, at 170 ("As already noted, most women with HIV infection and AIDS are mothers or are pregnant. Most of these women are single mothers and are the primary caregivers for more than one child . . . .").

84. See HIV/AIDS SURVEILLANCE REPORT, supra note 14, at 8 (showing 39% of reported female adult and adolescent AIDS cases in the "intravenous drug use exposure" category).

85. Id. (showing nearly 20% of reported female adult and adolescent AIDS cases in "sex with injecting drug user" exposure category).
assume that the parent knew the child well and knew who would best provide for the child's care.

The court also should consider who the child has been residing with during the pending of the guardianship proceeding. The issue of continuity and stability for the child is of critical importance. In most standby guardianship situations, the guardian already will have begun to function in this role prior to the death of the parent. The parent will be encouraging the child to develop a relationship with this new parental figure. Deference to the parent's choice provides certainty for these children at critical junctures in their lives. It is very disruptive and upsetting to the children to have this relationship and plan thrown into turmoil simultaneously with the parent's death. As described above, existing data indicates that stability and emotional support in the child's environment after a parent's death is extremely important. Uncertainty about where the child will live and who will care for her is damaging, and interferes with the child's mourning process.

Next, the court should consider whether the children are sufficiently mature to be consulted about their wishes as to whom the guardian should be. In many states, if neither parent is serving in this capacity and no testamentary appointment has been made, children over the age of fourteen are permitted by statute to designate their own guardian. Even younger children are likely to have preferences worthy of the court's consideration. However, the child's choice should not override the parent's unless it is

86. See BOWLBY, supra note 80, at 311-19.
87. A primary value of deferring to the custodial parent's choice is that it will usually mean a smooth and certain transition to a new caretaker. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 53-64 (1973). These authors' recommendation that the courts look for the "least detrimental alternative," rather than the idealized "best interests of the child," has relevance here. Id.
88. BOWLBY, supra note 80. Bowlby describes the literature on the grieving process of children. One of the sources he cites concludes that the consequences of a parent's death may be at least as important, and perhaps more important, than the death itself. In his opinion, it is such things as the break-up of the home and frequent changes in care giver that impact severely on children, and may result in neurotic illness or delinquent behavior. Id. at 311-19.
89. E.g., MD. CODE ANN., EST. & TRUSTS § 13-702 (1991) (providing that children age 14 or older may designate their own guardian).
established that the parent's choice will be detrimental to the child.\footnote{Ideally, in every custody or guardianship case, counsel for the child should be available. Unfortunately, this is not the current situation. Judges can and should discuss with the child privately the child's feelings about the proposed custody or guardianship arrangement. If the child has misgivings at that point, counsel for the child could be appointed to explore further.}

Another important consideration addresses the potential risks involved in encouraging parents to plan for their children and deferring to these choices. Undoubtedly, some situations may arise in which the parent's feelings and desires may conflict with what would traditionally be thought to be in the best interest of the child. For example, a mother might be estranged from members of her or the father's family who might be willing to provide a home for the children. However, those relatives will have the opportunity to challenge the mother's choice. If they can convince the court that the mother's choice will in fact be detrimental to the child, then they may be considered as potential guardians. However, there should not be an automatic presumption in favor of relatives, which would override the mother's choice.\footnote{Although courts tend to look first to the family as potential guardians, this may not always be in the child's interest. The child will need support and understanding to grieve the loss of the parent, and family members who were estranged from the parent may not be able to provide the support and understanding the child will need. There is still a great deal of fear and hostility towards people with AIDS. Family members who are unable to be supportive of a mother dying of AIDS may not be the appropriate people to raise that mother's children.}

If the mother has been estranged from relatives, it is likely that the child has had little or no relationship with these relatives. As a result, placement with a family friend whom the child knows and loves may be better for the child.

One question that may arise in reviewing a parent's guardianship appointment is what to do if a child has already been removed from her parent and placed in foster care. The fact that a parent does not presently have custody is not a complete obstacle to executing a standby guardian designation. Even when a child is removed for abuse or neglect, the parent retains her parental rights, and should be consulted about her child's future. If a parent has designated a standby guardian, the court should evaluate that
choice to determine if the placement would be detrimental to the child. The court should not, however, evaluate the parent’s choice of a standby guardian applying the same criteria that it would apply to a potential foster parent, since those criteria would eliminate many families with limited resources who nevertheless are capable of providing a good home.

Imagine, for example, the following scenario: Because of her illness, a mother places her three-year-old daughter in foster care three weeks prior to being hospitalized. Having no good choices available to her, she has not yet designated a standby guardian. After hearing about the mother’s illness for the first time, however, the mother’s sister moves back into the area to care for her and her daughter. Certainly, in this a situation, the mother’s wishes should be respected, and the daughter should be returned to her care. Unfortunately, however, once a child is in the foster care system, the system tends to disregard the initial cause for the placement and takes on a life of its own. It is not always a simple matter to terminate a foster care placement, even a voluntary placement such as this. The system needs to be reformed to take the circumstances of each individual case into consideration.

As another example, suppose a five-year-old child were placed in foster care due to neglect by her mother who is addicted to drugs. The child has been in foster care for one year. The mother executes a standby guardianship designation, even though she does not presently have custody of her child. The fact that the mother has not been the custodial parent for an extended period would be an appropriate factor to consider in evaluating her choice of a guardian. However, the mother does retain parental rights in this situation, and should be consulted about long-term planning for her child. If the parent informs social services that she has a relative or

93. Maryland, for example, has regulations that authorize voluntary placement. Md. Regs. Code tit. 7 § 07.02.11.06A (1973). However, voluntary placements are actively discouraged, and the vast majority of placements result in commitment of the child to DSS. Thus, DSS and/or a court must agree before the child can be removed from foster care. Md. Regs. Code tit. 7 § 07.02.11.22 A, B, & C (1973). This principle has developed in part because federal funds are available to pay for foster care where a judge has determined that such a placement is necessary. Funds are not as readily available for voluntary placements.

94. In Maryland, although voluntary placements are authorized by regulation, Md. Regs. Code tit. 7 § 07.02.11.06A (1973), in practice they are discouraged. Typically, a parent seeking to voluntarily place a child on a temporary basis is asked to agree to commitment of the child to the custody of DSS, meaning that the parent loses substantial control over when and if the child will be returned.
friend that is willing to care for her child, DSS should explore that placement. This may very well provide a better option for the child when compared to an indefinite foster care placement.95

VII. Other Issues Which Must Be Addressed To Facilitate the Useful Implementation of Standby Guardianship Statutes

A. The Need for Assistance for Terminally Ill Parents and Potential Guardians

Meaningful implementation of standby guardianship requires a great deal more than passing the relevant statutes. Implementation requires an organized effort to educate judges, lawyers, social workers, and case workers about the existence and purpose of this legislation. Moreover, these individuals must recognize that parents and guardians will require assistance to implement a standby guardianship appointment. For example, terminally ill parents must be informed of their options under standby guardianship, and will require assistance to prepare the appropriate papers to express their wishes for their children. These parents will also need assistance to negotiate through the court system.96

95. DSS policy is to explore family placements wherever possible. However, they typically will not explore placements with non-relatives, such as family friends. This is in conflict with standby guardianship, which places no limitation on who the potential guardian might be.


However, drug-addicted parents should be consulted and involved in future plans for their children, even if they are currently unable to care for them. In some cases, the parents may be living on the street and truly uninvolved and unable to contribute much, if anything, to their children's welfare. Often, however, parents struggling with an addiction need support to regain the ability to care for their children. They may very well have information that would be helpful to the agency making a plan for the child.

96. Maryland has already begun this process of outreach and education. For example, it has convened an ad hoc committee to assist in implementing this new legislation. Committee members include representatives of the Department of Health and Mental Hygiene, the Department of Social Services Chief Counsel's Office, HERO, Prince George's County Health Department, and the AIDS Administration. Additionally, student attorneys in the AIDS clinic, working under the supervision of myself and Professor Joyce McConnell, have prepared an excellent manual on standby guardianship, including draft pleadings. We have filed the first cases under this new statute.

During the spring semester of 1995, a class of twenty-five students, working with Professors Joyce McConnell and Karen Czapanskiy are continuing the project. Students are going out to community groups, including Head Start, medical clinics, neighborhood
In addition, financial assistance for the intended guardian undoubtedly will become an issue in many cases. The parent's relatives or friends may need financial assistance to take on this new responsibility. In some situations, at least some public aid may be available. However, in other situations, such as if the guardian is not a relative, these public benefits may not be available. Many deceased parents will have three or four children for whom care must be provided. Rarely can a family member manage to take on two, three, or even four children without some source of financial assistance. Friends of the ill parent are at an even greater disadvantage, as they typically will be unable to obtain even AFDC for the children for which they agree to provide care. Legislators must revise eligibility guidelines at the state and federal level to meet the needs of these children and their new caretakers.

B. The Role of Absentee Fathers in the Guardianship Decision

Another issue that courts must consider in the standby guardianship context is the reappearance of absentee fathers the time of death of the custodial mother. These fathers may attempt to assert control over their children at that time. As a result, mothers facing a terminal illness will be concerned about the future of their children under the father's control. Their concerns sometimes include a history of abuse by the absent father, but more often involve his financial and emotional abandonment of the family. Sometimes the father's family will attempt to step in at the time of the mother's death, raising the recurring question of how a conflict between the custodial mother's wishes and the paternal relatives should be resolved. As described above, deference to the mother's wishes seems preferable in most situations. However, the children should not be denied a relationship with their paternal relatives. If it appears to be in the child's interest, visits with these

organizations, and PTAs, to educate people in the community about this new legislation.

97. See Waysdorf, supra note 4, at 197.

98. Under federal law, non-relative caretakers, even if legal guardians, cannot qualify for Aid to Families with Dependant Children (AFDC). Federal law defines "dependent child" as one "who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece." 42 U.S.C. § 606(a) (1985).
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relatives should certainly be encouraged. However, the court should respect the mother’s wishes with regard to custody, unless it is established that her choice is likely to be detrimental to the children.

When the non-custodial parent is not in regular contact with the children, the court should not require an attempt to gain consent to appointment of a guardian. Reasonable efforts to provide notice of the guardianship appointment would be required, and the non-custodial parent would have the right to request a hearing for the opportunity to argue against the appointment. However, if the noncustodial parent is not seeking custody for himself, the court should not allow him to challenge the custodial parent’s guardianship appointment, unless he can establish that the guardianship appointment would be in some way detrimental to the children. This practice would promote deference to the custodial parent’s choice, limit litigation, and provide more certainty for the children.

Some critics may argue that a presumption in favor of the custodial parent’s choice of guardian could run afoul of the principles developed by the Supreme Court in Stanley v. Illinois. In Stanley, the Court was explicit in its objection to a presumption that all unmarried fathers were unfit parents.

99. Generally, extended family members do not have the right to demand such visitation, but courts may grant it if they find it to be in the child’s best interest. In addition, an increasing number of states have enacted statutes giving grandparents the right to seek visitation with grandchildren under certain circumstances. See Michelle M. Price, Comment, West Virginia’s New Grandparent Visitation Statute: A Step in the Right Direction, 95 W. VA. L. REV. 535 (1992-93).

100. Maryland Law requires that all persons with “parental rights” join in the petition, unless they cannot be found after reasonable efforts to locate them have been made. MD. CODE ANN., EST. & TRUSTS § 13-901(a) (1994). New York’s statute does not require this.

101. 405 U.S. 645 (1972). Although as a Constitutional matter, a putative father who has had no or minimal contact with his children is not necessarily entitled even to notice in this situation. Which seems on balance to be appropriate. See, e.g., Lehr v. Robertson, 463 U.S. 248 (1983) (holding that notice to child’s putative father, who had not supported and rarely visited his child, was not required in adoption proceeding, as father had failed to file with registry that would have guaranteed notice). However, notice simply informs the father of what is happening, and gives him the opportunity to be heard. In the long term, especially when children have lost one parent to AIDS, they may benefit from having some relationship with their father and his family. See also Shanley, supra note 22.

102. Stanley, 405 U.S. at 649. The Court proclaimed: Is a presumption that distinguishes and burdens us all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley [the father] was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other
What is proposed here, however, is substantially different from the presumption in *Stanley*. If the non-custodial parent wishes to seek custody for himself, despite limited contact with the children, he will be given the opportunity to be heard. However, unless he is in the position to assume full custodial care of the children, he will not be given the opportunity to disrupt the plan that the mother has already begun to implement, unless he can show that the confirmation of this appointment would be detrimental to the children.

However, this is not the end of the consideration of the non-custodial parent’s rights in this situation. The court has the authority to grant the father ongoing visitation with the children, assuming there is no finding that this would be adverse to the children’s interest. Peggy Davis, a Law Professor and former Family Court Judge, concludes that children often have a great need to maintain ties with their biological parents, and need assistance in integrating multiple parental figures into their lives.

Historically, under the abuse and neglect system, if a parent is unable to take on full custodial care for a child within a mandated period of time, child welfare will move to terminate parental rights. However, this is not always in the best interest of the child. Although a child does need a parent who will provide stability, it does not necessarily follow that permitting visits with the natural parent will be disruptive or harmful. These decisions should be made on a case-by-case basis. For example, if a father wishes to remain involved in the child’s life, but is unable to assume full custodial care, visits may be in the child’s best interest.

When parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

*Id.*


104. Although Goldstein, Freud and Solnit’s ideas in *Beyond the Best Interests of the Child*, supra note 87, and their later book, *Before the Best Interests of the Child* (1979), have had tremendous influence on the law governing child welfare decisions, some of their conclusions have been the subject of substantial criticism. For example, they have concluded that a child’s need for stability and security requires exclusivity in parental relationships. A “visiting parent,” in their view, contributes little to the child’s development and may prove destructive. However, Carol Stack, among others, has criticized this conclusion as failing to acknowledge the reality that shared parenting among extended family members is the norm.
a child has lost one parent, this connection to the surviving parent may prove especially important. Such children can be assured stability by making it clear in appropriate cases that the natural parent has lost the right to assume custody in the future and will be limited to visitation only.

C. Identifying a Guardian

A final issue that may arise under standby guardianship involves finding a guardian when parents are unable to identify a family member or friend who is able to take full responsibility for their children after their deaths. The New York Child Welfare Administration has recently implemented a pilot program known as the “Early Planning Project,” which is trying to address this issue. The Child Welfare Administration has recognized the value of encouraging and assisting families impacted by HIV in planning for the future care of their children. The Project is specifically designed to aid families who have been unable to locate a family member or friend who is willing and able to care for the children without financial assistance. The Project will assist parents in finding a foster home for their children. Unlike the CINA system, the Project sees its role as empowering parents to make decisions for their children, and workers do their best to assist in carrying out parents’ wishes, as long as those wishes do not result in potential danger to the children.105

The Project gives terminally ill parents and their children the opportunity to meet the prospective foster family to see if they will be a comfortable match. The Project also encourages contact between the foster parents and the family prior to the placement of the children in the foster home. In theory, the children will live with the foster parents if their parent is hospitalized or simply needs respite care, and then will return to their original home.

However, this new Project has several weaknesses that stem from the Project’s connection with the traditional dependency


For an excellent discussion of the need to consider separately issues of the permanent loss of custody from the termination of all parental rights, see Marsha Garrison, Why Terminate Parental Rights?, 35 STAN. L. REV. 423 (1983).

system, and the limitations of family law as presently written. Even the "Early Planning Project," which has as its stated goal the empowerment of parents to make plans for their children, contains the seeds of the parent's disenfranchisement. For example, a parent participating in the Project must sign a Voluntary Placement Agreement. By signing this Agreement, these parents are transferring the care and custody of their children to the Commissioner of Social Services. The foster care placement is treated just like any other placement, and parents are warned that a reviewing court has the authority to direct the agency to work towards discharging the child from foster care to either the parent's home or to a potential new adoptive home.

In essence, parents then lose all meaningful control over the future care of their children. Although the agency theoretically must return the children to their parents as requested, the agency explicitly reserves the right to block the return by seeking a court order. The likelihood of a child being returned at the request of a parent is remote when the child has already been placed out of the home and when the parent is suffering from a terminal illness.

While the Agreement provides that the agency must return the child within twenty days unless a court order exists or has been obtained to prevent the return, the standard that a court must apply in considering whether to honor a parent's request is not at

106. The guidelines for the Project refer to a situation in which the parent may be offered the option of surrendering parental rights. This should be discussed only in cases in which the parent feels comfortable with adoption proceedings beginning prior to his or her death. It is suggested that this may be useful to a parent who wants to insure that certain relatives will be unable to assume custody upon the parent's death.

Relinquishment of parental rights should not be necessary. The new adoptive parents should be confirmed with their status to take effect immediately upon the parent's death. For example, a father and mother are permitted to share guardianship of their children, and no one demands that there be only one person making parental decisions. However, medical providers and social services workers are apt to be disoriented by the idea of a mother and grandmother sharing guardianship rights, even though this is the family's everyday reality. See Karen Czapanskiy, Grandparents, Parents, and Grandchildren, Actualizing Interdependency in Law, 26 CONN. L. REV. 1315 (1994) (urging legal recognition of co-parenting by mother and grandmother).

It is also important to note that it is being suggested that this option be made available to parents, not that it be imposed upon them. Such a sharing of responsibility is likely to work well only if both people willingly enter into such a relationship.

107. See EARLY PERMANENCY PLANNING PROJECT, INTAKE PROCEDURES 4 (on file with author).

108. See EARLY PERMANENCY PLANNING PROJECT, VOLUNTARY PLACEMENT AGREEMENT BY PARENT OR GUARDIAN, addendum to INTAKE PROCEDURES, supra note 107.
all clear. However, it appears that this standard will be much broader than a simple inquiry into whether a child will be at risk for neglect. Yet, the parent’s request to have the child returned home should only be denied when substantial evidence exists that a parent’s incapacity to care for the child will put the child at risk. To avoid placement of the child in foster care, funds should be made available to pay for an in-home aid who could help with housework, preparing meals, and other necessary tasks when appropriate. In theory, this system would be consistent with federal legislation mandating that reasonable efforts be made to avoid placing a child in foster care. In practice, however, such resources are often unavailable. Presumably, many attorneys would have a very difficult time recommending to clients that they sign the Agreement as written, unless they were ready to permanently relinquish the care and custody of their child to a foster family.

VIII. Conclusion

The current trend towards enacting standby guardianship statutes and other innovative programs with the goal of empowering terminally ill parents to plan for the future of their children is a positive one. It is an unusual step towards respecting the autonomy of poor parents that is long overdue. However, much work needs to be done to ensure that these statutes are implemented with this respect in mind. Education of all those involved, including judges, attorneys, social workers, medical providers, and parents is essential. In addition, some allocation of financial resources to support standby guardians is necessary. For those families in which no relative or friend is available to step

110. See Study of Black Children in Foster Care, supra note 30.
111. Obviously, there is a tremendous need to address in a broader way the unequal treatment of poor families by the child welfare system, but that is beyond the scope of this article.
112. In Maryland, we have already begun this process. We have brought together representatives of the foster care system, social workers who work with HIV positive parents, counsel to the Department of Social Services, and attorneys who work with these clients, to discuss how best to implement this new statute. We have begun meeting with judges to discuss with them our concerns about implementation, such as, confidentiality of client’s medical status and expedited treatment for these cases. Student attorneys in our clinical program, working under the manual on standby guardianship, went out to community groups such as Head Start and PTAs to educate community members about this new legislation.
in and care for their children, a new placement system is desperately needed. Such a system must be separate from the abuse and neglect foster care system already in place, and must respect the dignity and autonomy of ill parents and their families.