

SECURING THE CARE OF CHILDREN IN DIVERSE FAMILIES: BUILDING ON TRENDS IN GUARDIANSHIP REFORM

Joyce E. McConnell[†]

I. Introduction

II. Current Law: Inadequately Meeting Needs of Diverse Families and Their Children

A. Continuum of Transferred Rights

B. Traditional Guardianship

1. Basic Principles of Legal Parents' Natural Guardianship Rights

2. Testamentary Appointment of Guardian

3. Inter Vivos Nomination of Guardian

C. Nontraditional Guardianship: Standby Guardianship

D. Coguardianship

E. Power of Attorney

F. Delegations of Parental Authority for Limited Purposes: Medical Care and School Enrollment

III. Current Scholarship

IV. Proposed Guardianship Solution to Meet Diverse Family Forms

A. Reality—"The Way We Never Were"/"The Way We Are"¹

1. Family Form Entering the 21st Century

2. Differences in Family Form

a. Quantitative Overview

b. Quantitative and Qualitative Differences

B. Proposed Solution: Concurrent Guardianship

1. Rights of Noncustodial Parents

2. Conflicts Between Guardian and Parent

3. Burden on the Court

V. Conclusion

[†] Associate Professor of Law, West Virginia University College of Law. The West Virginia University College of Law, 1997 Hodges Summer Research Grant Fund provided the financial support that made this article possible. I am thankful for the commitment of the Hodges Fund to scholarship. Former Dean Terec Foster and Dean John Fisher both provided encouragement throughout this project. I thank them for their support.

¹ I borrow this phrase from STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992) [hereinafter *THE WAY WE NEVER WERE*] and *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* (1997) [hereinafter *THE WAY WE REALLY ARE*].

I. INTRODUCTION

The issue of childcare has been widely discussed and hotly debated in recent years. Discussions about mothers unequally burdened with childcare and fathers needing to take greater responsibility proliferate in magazine articles and on television shows. Searching deeper into this societal dialogue on child care reveals that the focus is on childcare within the normative nuclear family: a biological or adoptive family with a mother, a father, and a child. The needs of single parents² living alone with their children or in diverse family forms are often not mentioned in the conversation. Yet, single parents have at least as much, if not more, of a need to share their childcare duties with another adult.

The notion that childcare can and should be shared within the normative family is represented in the legal concept of joint guardianship arising from natural law principles.³ Joint guardianship is a trust relationship created and recognized by law in which adults share the authority to make decisions for a ward. Biological or adoptive parents are the joint guardians of their children, and biological parents are referred to as natural guardians.⁴ In our national conversation about shared childcare, we do not acknowledge that while joint guardianship plays a critical role in facilitating shared childcare in the normative nuclear family, it impedes shared responsibilities in single-parent families where one parent is not sufficiently involved in the child's life to serve as the joint guardian. This Article proposes that a single parent, who cannot rely on the other legal parent to take responsibility for their child, be permitted to share joint guardianship rights with another adult. I term this proposal "concurrent guardianship." I use the term because it expresses the coterminous nature of the authority shared by the parent and guardian for a child in the new form of guardianship that I propose.

Understanding natural guardianship is key to realizing the legal and practical significance of concurrent guardianship and how it can make a difference in the lives of single parents and their children.⁵ The law confers upon the parents the status of being the natural guardians of their children to support the nuclear family's efforts to raise children. Natural guardianship invests both parents with equal and simultaneous rights to share childcare. Together or alone, each parent has the authority to make decisions for the child. When one parent is unavailable to exercise legal authority for a child, the other, conferred with joint guardianship

2. I adopt the United States Bureau of the Census definition of single parent, which includes parents who never married and those who were once married, but who are now separated, divorced, or widowed. See Arlene F. Saluter, *Marital Status and Living Arrangements: March 1993*, U.S. BUREAU OF THE CENSUS CURRENT POPULATION REPORTS SERIES P-20, NO. 461, at V (1994).

3. See 1 WILLIAM BLACKSTONE, COMMENTARIES *449-54 (stating that the rights and duties of parents arise from natural law principles) and *infra* note 16.

4. See 39 AM. JUR. 2D *Guardian and Ward* § 1 (1968 & Supp. 1997).

5. See generally Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992) (providing an historical overview of the rights and duties of parents and their children).

rights, may step in and exercise the authority necessary to meet the child's needs. Sharing and shifting the exercise of responsibility for children in this way is a common, everyday occurrence. Dentists, doctors, scouts, schools, sports, and field trips all require the authorization of a parent or legal guardian. Biological or adoptive parents living with their children rely on the ultimate security of the concurrent rights that natural guardianship bestows on the family: if one parent becomes unable to care for the child, the other parent, already vested with legal authority may simply step in to fill the void. For single parents and their children, however, the privileges of natural guardianship are more problematic than helpful.

When children live with one parent, the unavailability of the other parent on a daily basis makes shifting shared legal authority less likely. Under the best circumstances, the non-custodial parent will live close to the children and will maintain enough of a relationship with the custodial parent to continue to share the joys and burdens of raising children. Unfortunately, many single parents, mostly mothers and their children, do not live in such circumstances.⁶ Many non-custodial parents do not remain sufficiently involved in their children's lives to make shifting of legal authority between parents feasible. For many single, custodial mothers and their children, natural guardianship offers little security. Outside the normative procreative or adoptive family, the law traditionally recognizes no mutual and simultaneous guardianship powers between a parent and another adult.⁷ Limiting concurrent rights to natural or adoptive parents deprives single-parent families of a foundation upon which to build stability and continuity.⁸ Ultimately, it denies the custodial parent and child the comfort of knowing that if the custodial parent becomes too ill to care for the child or dies,⁹ the child will have an actively engaged, legally authorized adult to care for her.¹⁰

To demonstrate the need for my conception of concurrent guardianship, Part II of this Article explores the current law and its inadequacies. First, it examines the basic principles of parents' natural guardianship and the traditional mechanisms of testamentary and inter vivos guardianships to transfer guardianship rights. It

6. See RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER*, 229-31 (1995) (reporting that two-thirds of children living alone with mothers have no contact with their fathers and receive no child support) (relying on FRANK F. FURSTENBERG & GRETCHEN A. CONDRAN, *FAMILY CHANGE AND ADOLESCENT WELL-BEING: A RE-EXAMINATION OF U.S. FRIENDS IN THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY* 117-39 (Andrew J. Cherlin ed., 1988)).

7. See R. Alta Charo, *Biological Determinism in Legal Decision Making: The Parent Trap*, 3 TEXAS J. WOMEN & L. 265, 268 (1994) (demonstrating the ways in which the law grants or denies legal rights based on the idealized nuclear family).

8. Children benefit from stable homes and multiple caregivers so that there are not gaps in care. EMMY E. WERNER & RUTH S. SMITH, *VULNERABLE BUT INVINCIBLE: A LONGITUDINAL STUDY OF RESILIENT CHILDREN AND YOUTH* 120-64 (1982).

9. With limited exception this statement is correct. Part II, subsections C, D & E, *infra* pp. 38-42 describe the limited exceptions created by new forms of guardianship, powers of attorney, and delegations of parental authority for medical care and school enrollment.

10. See Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 194-96 (1993) (explaining that the law presumes that children belong to their biological parents and how this can limit the rights of involved caretakers, whom he labels "psychological parents").

11. See *infra* Part IIC. New York's uses "standby guardian" to describe the new guardianship arrangement it was the first to create. N.Y. SURR. CT. PROC. ACT LAW § 1726.1(a) (McKinney 1996).

examines two new forms of guardianship: standby guardianship,¹¹ and coguardianship.¹² It reviews traditional and new forms of power of attorney and new laws permitting parents to authorize others to consent to a child's medical care or enrollment in school.

Part III of this Article discusses current scholarship which suggests the law's failure to meet the needs of single parents to share legal responsibility for their children with other adults. I will elaborate on this scholarship and show where concurrent guardianship expands upon or departs from prior proposals.

Part IV describes diverse families and their guardianship needs and introduces the substantive and procedural characteristics of the concurrent guardianship that I propose. I provide both quantitative data and qualitative information showing that the normative nuclear family is not typical, but rather that diversity in family form is the norm. Sixty percent of children will spend some part of their youth in single parent-homes.¹³ Furthermore, race, ethnicity, immigration, class, and sexual orientation may affect the importance of extended family to a parent and her child. The proposed concurrent guardianship will not only meet the needs of parents and children to empower other adults to have legal authority for children, but will also be a legal mechanism respectful of diverse family forms.

Part IV measures concurrent guardianship against four criteria. First, it should be a simple procedure, one that is accessible and can be completed without involving the courts. Second, concurrent guardianship should protect the rights of non-custodial parents and their children. Third, it must plan to resolve conflicts between custodial and non-custodial parents and guardians. Fourth, concurrent guardianship should not burden the courts unnecessarily.

Part V concludes that the stability and continuity of legal authority that concurrent guardianship provides far exceeds the problems it may create. For the many children and their custodial parents who cannot depend on the other parent, concurrent guardianship will provide the flexibility and stability that joint guardianship facilitates for the normative nuclear family.

II. CURRENT LAW: INADEQUATELY MEETING NEEDS OF DIVERSE FAMILIES AND THEIR CHILDREN

A. *Continuum of Transferred Rights*

It is difficult for most parents to acknowledge their inability to care for and exercise legal authority on behalf of a child. For a single parent, however, this admission involves confronting the legal vulnerability of the single-parent family form—the limits of natural guardianship. Generally, parents cannot share

12. See *infra* Part II. D. Connecticut's legislature uses "coguardian" in its statute providing for shared guardianship between a parent and a nonparent. CONN. GEN. STAT. ANN. § 45a-616(b) (West 1998).

13. See Arthur J. Norton & Paul C. Glick, *One Parent Families: A Social and Economic Profile*, 35 FAM. REL. 9, 11 (1986).

guardianship with another adult who is not a natural or adoptive parent.¹⁴ Instead, states force a parent to choose between two unsatisfactory options: she may either relinquish her rights and transfer them to another adult, or continue to be vulnerable to illness or disability leaving her without another adult with legal authority for the child. A parent pushed by need will sometimes choose to transfer guardianship to another adult, but for those who do, it is a wrenching choice.

The legal mechanisms available to a parent to transfer authority for their child can be placed on a transferability continuum. Where these mechanisms appear on the continuum depends on substantive and temporal criteria. The first includes the extent of the rights transferred, while the second addresses the duration of the transfer. Adoption anchors one end of the continuum. As the natural guardians of their children, parents can relinquish their rights entirely, leaving them no residual substantive rights with no temporal limitation. Power of attorney and other methods of empowering adults with limited authority occupy the other end of the continuum. Such methods transfer specific substantive rights for limited periods of time. Traditional guardianship falls closer to the adoption end of the continuum and is often used by the state when it places children in foster care. While the transfer of rights that takes place to create a guardianship does not terminate parental rights to the same extent that adoption does, it transfers almost all parental rights to the guardian,¹⁵ whether the guardian is an individual or the state. What remains is the child's right to inherit from the legal parent and the parent's responsibility to continue to support the child.

Because this Article seeks an alternative to parental relinquishment of all substantive rights with no temporal limitation, it does not analyze adoption as an option. Similarly, because my proposal seeks to empower parents to make care arrangements for their children that do not involve the state's control of the child, the Article does not address foster care. This Article focuses on the power of parents to create guardianships. The following section examines the continuum that begins with guardianship and ends with limited authorizations. It reveals the

14. See Levy, *supra* note 10.

15. Section 2-114 of the Uniform Probate Code describes the relationship between adoptive parent and child relationship for intestate succession as: "(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents. . . ." UNIF. PROBATE CODE § 2-114 (amended 1993), 8 U.L.A. 91 (1998).

Section 5-209 specifies the powers and duties of a guardian of a minor. Subsection (a) states, "A guardian . . . has the powers and responsibilities of a parent regarding the ward's support, care and education. . . ." Subsections (b) prescribes mandatory responsibilities and states, "a guardian shall: (1) stay personally acquainted with the ward. . . ; (2) take reasonable care of the ward's personal effects. . . ; (3) apply any available money of the ward to the ward's . . . needs for support, care and education; (4) conserve any excess money. . . ; (5) report the condition of the ward. . . ." Subsection (c) permits the guardian to "(1) receive money payable for the support of the ward. . . ; (2) if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment the ward, take custody of the person of the ward and establish the ward's place of abode within or without this State; (3) . . . take . . . appropriate action to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward; (4) consent to medical or other professional care, treatment, or advice for the ward. . . ; (5) consent to the marriage or adoption of the ward; and (6) if reasonable. . . delegate to the ward certain responsibilities for decisions affecting the ward's well-being." UNIF. PROBATE CODE § 5-209 (amended 1993), 8, U.L.A.345 (1998).

inadequacies of both extremes and the need for an alternative by which parents can create flexible shared guardianships.

B. *Traditional Guardianship*

1. *Basic Principles of Legal Parents' Natural Guardianship Rights*¹⁶

Guardianship interests, like property interests, include rights and concomitant duties. The property concept of "a bundle of rights" provides a helpful comparison.¹⁷ A parent's rights regarding her children are bundled, but separable; they are capable of being parsed, some distributed and some retained. Some of the most obvious rights and responsibilities are those of physical and emotional care,

16. "Natural guardianship" has its roots in feudal common law. See AM. JUR. 2D, *supra* note 4, at § 4 (2d 1968 & Supp. 1997). A review of the evolution of "natural guardianship" helps to explain its nature, tangled in the traditional supremacy of the father. For at common law, children had only one guardian and that was their father. Mothers had no guardianship rights to their children, unless the children were born outside of marriage. See 10 AM. JUR. 2d *Bastards* § 60. In legally sanctioned marriages the father was the sole natural guardian of the eldest son until the child turned twenty-one. His responsibility to the other children was more limited; he was responsible for other sons until fourteen and for daughters until sixteen. See AM. JUR. 2D, *supra* note 4, at § 4. The guardianship of the eldest son and the other children became known respectively as the guardianships of nature and nurture. See *id.*

When systems of primogeniture ended, so did the distinction between the father's guardianship of nature and nurture. See *id.* For most of history, however, the distinction between the father's rights and the mother's lack of them remained. In the early American colonies fathers continued to hold guardianship rights exclusively. See, e.g., MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 25 (1985) (discussing the way in which a father's rights over his children was absolute and property-based). Until the nineteenth century, fathers were entitled to children's wages and to contract out their services through apprenticeships or wage labor. See Woodhouse, *supra* note 5, at 1036-50 (synthesizing changes in family law beginning with patriarchal ownership of children, moving to egalitarian rights shared by mother and father and away from a property-like concept of children and finally acknowledging children as deserving members of the state).

Recently, the common law has recognized both the father and mother as the natural guardians of their biological or legal children. See AM. JUR. 2D, *supra* note 4 at § 5 (2d ed. 1968 & Supp. 1997). Even in the early twentieth century, only half the states recognized mothers and fathers as having equal guardianship rights. See Woodhouse, *supra* note 5, at 1049 & n.257 (1992) (describing two *Ladies' Home Journal* articles, in 1919 and 1920, in which an exchange took place between the writer of an article pointing out that in half the states only fathers had rights to their children and the Dean of the Washington and Lee School of Law replying that this was true and as it should be.) Gender equality cemented the principle that parents, no matter their gender, share parental rights, including those of the natural guardian. Beginning in the early 1970s, the United States Supreme Court began to develop a "gender jurisprudence under the Equal Protection Clause." While I could find no case challenging the constitutionality of a gender preference in guardianship, equality theorists point to *Reed v. Reed*, 404 U.S. 71 (1971), as starting the trend in equality litigation and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), as signaling its end. By 1982 gender equality was a well-established principle that states had to embrace by conforming their laws to its requirements. See BARBARA ALLEN BABCOCK ET AL., NATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 161-62 (1996).

17. Property scholars trace the "bundle of rights" concept of property to Wesley Newcomb Hohfeld, who first articulated the conception of property as a "complex aggregate of rights (or claims), privileges, powers, and immunities . . ." *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746 (1917). See also CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE 3-4 (1997).

custody, medical treatment, educational and religious decision-making, and financial support.¹⁸

At common law, there were two common forms of guardianship: testamentary and inter vivos.¹⁹ In some ways both were simple and complete: simple because parental rights were bundled and transferred as a single, inseparable unit, and complete because all rights and responsibilities were transferred together. A testamentary guardianship, one created by both parents or by a sole, surviving parent, worked a complete transfer of all rights and responsibilities to the guardian nominated in the will of both parents or the surviving parent. A guardianship created by a parent by inter vivos transfer was also simple and complete, except that the parent remained obligated to support the child and the child could inherit from the parent.

2. Testamentary Appointment of Guardian

Seeking to clarify guardianship and to make the transfer of rights to make decisions on behalf of children uniform among the states, the National Conference of Commissioners on Uniform State Laws (the Commissioners)²⁰ addressed transfer issues in three different uniform laws, all of which are now incorporated into the Uniform Probate Code (UPC).²¹ The Commissioners included

18. Professor Katharine Bartlett provides the following description of the rights and responsibilities in *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):

Parental rights are comprehensive, and they operate against the state, against third parties, and against the child. Parents have the right to custody of their child; to discipline the child; and to make decisions about education, medical treatment, and religious upbringing. Parents assign the child a name. They have a right to the child's earnings and services. They decide where the child shall live. Parents have a right to information gathered by others about the child and may exclude others from that information. They may speak for the child and may assert or waive the child's rights. Parents have the right to determine who may visit the child and to place their child in another's care. Parents' duties correspond to their rights. Parents must care for their child, support him financially, see to his education, and provide him proper medical care. They have the duty to control the child, and if they fail in this duty, they may be required to answer for the child's wrongdoings.

Id. at 884-85 (citations omitted).

19. See AM. JUR. 2D, *supra* note 4, at § 4.

20. The National Conference of Commissioners on Uniform State Laws is a unique and powerful organization given life by the American Bar Association in 1889. Its purpose is to "promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." CONSTITUTION OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Section 1.2., *Appendix: Constitution and Bylaws in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-EIGHTH YEAR* (1989). Each state, the District of Columbia and Puerto Rico, are represented by four Commissioners appointed by the chief executive or the legislature. Commissioners are lawyers, judges, legislators and law professors. The Commissioners draft uniform laws and provide extensive comments to promote "uniformity of judicial interpretation." See *Appendix: History of National Conference in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-EIGHTH YEAR* (1989).

21. As adopted originally in 1969, Article V of the Uniform Probate Code governed guardianships for minors and adult incompetents, but provided for no limited guardianships of adults. UNIF. PROBATE CODE, ART. V (amended 1993), 8A U.L.A. 440-442 (1998).

testamentary and inter vivos guardianships in the initial 1969 Uniform Probate Code. Next, the Commissioners addressed powers of attorney with the Uniform Power of Attorney Act in 1979. Finally, the Commissioners added limited inter vivos guardianships for adults to the Uniform Probate Code through the 1982 Uniform Guardianship and Protective Proceedings Act (UGPPA).²² While not explicitly acknowledging the transferability continuum, the Commissioners implicitly recognized such a concept in the uniform laws they developed. This section examines the testamentary appointment of a guardian provided for in the Uniform Probate Code.

Our society views testamentary guardianship as the selfless act of responsible parents to provide for the care of their minor children. No one disputes the need for parents to provide for the care of their children. Therefore, to appoint a guardian by will is the most familiar and accepted form of guardianship. The Uniform Probate Code reflects common testamentary guardianship requirements.²³ There must be a written instrument, attested by two witnesses.²⁴ If both parents are living, both must nominate the guardian.²⁵ One parent may consent only where one parent remains alive and the will is that of this sole surviving parent.²⁶ Through the will of the surviving parent, she or he can nominate a guardian whose authority will become effective only when the parent dies. Courts generally defer to the parental nomination of the guardian in the will and accord the testator parent the presumption that she knows what is best for her child.²⁷

22. In 1982, as part of a continuing review of the UPC, the Commissioners developed the Uniform Guardianship and Protective Proceedings Act to serve both as an amendment to the UPC as well as to be a free-standing law that could be adopted independent of the UPC by the states. The impetus for the 1982 amendments and Act was the ABA Commission on the Mentally Disabled, which recommended that state laws be reformed to avoid the complete stripping away of an adult incompetent's autonomy. Heeding this advice, the Commissioners created a "limited guardianship" for adult incompetents. UNIF. PROBATE CODE, ART. V, PARTS 1, 2, 3 & 4 (amended 1993), 8A U.L.A. 440-42 (1998).

23. See UNIF. PROBATE CODE, ART. II, PART 5 (amended 1993), 8 U.L.A. 144-46 (1998).

24. See UNIF. PROBATE CODE § 5-202(a) (amended 1993), 8 U.L.A. 333 (1998).

25. See UNIF. PROBATE CODE § 5-202(b) (amended 1993), 8 U.L.A. 333-334 (1998).

26. See *id.*

27. See generally L.S. Tellier, Annotation, *Function, Power, and Discretion of Court Where There is Testamentary Appointment of Guardian of Minor*, 67 A.L.R. 2d 803 (1959 & Supp. 1995); AM. JUR. 2d, *supra* note 4, at § 15 (1968 & Supp. 1997) (discussing the court's deference to the parent's testamentary nomination of a guardian for their child).

3. *Inter Vivos Nomination of Guardian*

In contrast to our cultural approval of testamentary guardianship, we have a different view of an inter vivos nomination of a guardian of a child during a parent's lifetime. This procedure is generally seen as aberrant and necessary primarily because of parenting failure or selfishness, or because of an incorrigible child. A few examples of inter vivos guardianships demonstrate this perspective. Take the case of a teenage single mother who may not be able to take responsibility for her child. She may make her parents, the child's grandparents, the child's legal guardians. Or, consider parents who are unable to control their teenager's alcohol or drug-related behavior. They may vest guardianship in a relative, perhaps one living far enough away to remove the child from the environment contributing to his substance abuse. Finally, of course, there is the situation where parents cannot control or care for their child and the state intervenes to become the guardian of the child, either at the request of the parent or after a state investigation.

Inter vivos guardianship of minors in the UPC assumes that the appointment of a guardian completely transfers a parent's rights to a guardian.²⁸ Under the UGPPA, a parent must meet two conditions to make an inter vivos appointment of a guardian by deed. First, if the child is fourteen or older there must be no pending objection. Second, the surviving parent must be adjudged incapacitated, or the parent must surrender, if not already deprived by court order, all parental rights.²⁹ Despite the all or nothing character of inter vivos appointments of guardians of minors, the Commissioners did recognize the need for more limited guardianships for adults.³⁰ The Commissioners expressed their belief that intrusions on the autonomy of an adult should be limited by the needs of the adult, and they admonished the courts to use the "least-restrictive protection approach."³¹

In an attempt to provide more options in limited transfers of authority, the Commissioners clarified the extent to which a power of attorney could be used to empower another to care for one's children. The Commissioners established a model for the states that permits a parent to delegate "any power" for up to six months, including the care and custody of the minor and the minor's property, but excluding the power to consent to marriage and adoption.³² However, this

28. The Commissioners' Comment on Section 2-101 of the UGPPA refers to UPC Section 5-201 as the source for the section. It states that "the Act makes the guardian and ward status more like the parent/child status it replaces." UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 2-101, 8A U.L.A. 467 (1998). It states this in pointing out that before the UGPPA, if the guardian and/or child moved to another jurisdiction, the court carried the principal responsibility for the ward. In other words, in such a situation the court and not the guardian became the responsible party.

29. *Id.* at § 2-102.

30. See UNIF. PROBATE CODE §5-306(c) (amended 1993), 8 U.L.A. 365 (1998).

31. See UNIF. PROBATE CODE, ART. V, Prefatory Note, (amended 1993), 8 U.L.A.323 (1998).

32. "A parent or guardian of a minor or incapacitated person may delegate to another person, for a period not exceeding 6 months, any power regarding care, custody or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward." UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 1-107, 8A U.L.A. 451 (1998).

proposal does not go far enough to meet the needs of single parents who need to share guardianship of their children with adults who are not the other biological or adoptive parents.

C. *Nontraditional Guardianship: Standby Guardianship*

Three recent developments—the rise in single parenting,³³ substance abuse,³⁴ and AIDS³⁵—have caused a rapid and large increase in the number of children needing to be cared for by other adults. To respond to this need, some states reformed the laws governing the guardianship of minors.³⁶ They enacted laws permitting new forms of guardianship. These laws allow parents who are

33. See Steve W. Rawlings, Household and Family Characteristics: March 1993, U.S. BUREAU OF THE CENSUS CURRENT POPULATION REPORTS SERIES P-20, NO. 477, Apr. 1994, at V-VII (1994) (reporting that 87 percent of children living with a single parent live with their mothers, 13 percent with their fathers).

34. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1428 (1991).

35. AIDS is an acronym for Acquired Immune Deficiency Syndrome. The Human Immunodeficiency Virus (HIV) causes AIDS by destroying an essential component of the body's immune system. HIV has a long latency period and infected individuals can be asymptomatic for up to ten years or more. When a person becomes symptomatic and develops multiple opportunistic diseases, the individual then has AIDS. See *Faya v. Almarez*, 620 A.2d 327, 328-29 (Md. 1993). While there is still no cure, new drug therapies make it possible to manage AIDS as a long-term, chronic disease. See Lawrence O. Gostin & Zita Lazzarini, *Prevention of HIV/AIDS Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention*, 46 EMORY L.J. 587 (1997) (explaining that new drug therapies increase survival and costs of life-long health care and disease treatment.)

36. Ten states explicitly permit the appointment of standby guardians. See CAL. PROBATE CODE § 2105(f) (Deering 1991 & Supp. 1997) (permitting California courts to create a co-guardianship for a minor child in a parent and person nominated by the parent); CONN. GEN. STAT. ANN. § 45a-624, 624g (West 1998) (permitting Connecticut parents to designate a standby guardian for a minor where both surviving parents consent); FLA. STAT. ANN. § 744.304(1) (1997) (allowing Florida courts to appoint a standby guardian for minor children where all surviving parents petition and/or consent to the appointment); ILL. ANN. STAT. ch. 755, para. 5/11-8.1 (Smith-Hurd Supp. 1997) (allowing a parent in Illinois to designate and a court to appoint a standby guardian for a minor child); MD. CODE ANN., EST. & TRUSTS, §§ 13-901 to 908 (Supp. 1997); MASS. ANN. LAWS ch. 201 § 2b (Law. Co-op. Supp. 1998); N.J. STAT. ANN. §§ 3B:12-67 to 78 (West Supp. 1997) (recognizing an imperative need in New Jersey to permit a custodial parent or legal custodian to establish a standby guardianship); N.Y. SURR. CT. PROC. ACT LAW § 1726, 1757 (McKinney 1996 & Supp. 1998) (allowing a parent in New York to create standby guardianship for minor children to take effect upon the parent's death or incapacity); N.C. GEN. STAT. § 35A-1373 (1997) (allowing a parent in North Carolina to designate a standby guardian); and WIS. STAT. ANN. § 880.36 (West 1991 & Supp. 1997) (establishing standby guardianship in Wisconsin).

terminally ill, or those who anticipate physical disability or mental incapacity resulting from the terminal illness, to empower another adult to hold simultaneous guardianship rights. These rights generally remain inchoate until needed. These guardianships, often referred to as standby guardianships, empower adults, who are not natural parents, to exercise all or some of the rights of guardianship when the custodial parent cannot.³⁷ However, standby guardianship is unable to meet the needs of most single parents and their children.

A profile of a single mother with AIDS illustrates the situation for which standby guardianship was designed.³⁸ Tracy learned that she had AIDS in 1993, two years before she died of the disease. When she was diagnosed, her daughter Sheila was seven years old. Sheila's father, Brandon, had never lived with them, did not provide child support, and had not visited Sheila for years. Tracy and Brandon did not talk, and Tracy did not know where he lived or worked. Before getting sick from AIDS, Sheila stayed in child care while Tracy worked. Tracy relied on her sister, Karen, to care for Sheila during evenings and weekends. When Tracy became ill, she stopped working and moved in with her sister. Knowing that she was going to die, Tracy wanted Karen to share legal authority to care for Sheila and to take legal action on Sheila's behalf. Tracy, however, was not prepared to relinquish her parental rights while she was alive. She wanted to be able to rely on her sister when she needed to, but to do what she could for her child when she was able. In other words, what she wanted was a fluid means of sharing the authority that she would have had with her child's father, had he participated in their lives. Under traditional guardianship law, she would have to

37. See CAL. PROBATE CODE 2105(f) (West Supp. 1995) (permitting California courts to create a co-guardianship for a minor child in a parent and person nominated by the parent); CONN. GEN. STAT. ANN. § 45a-624a to 45a-624g (West Supp. 1995) (permitting Connecticut parents to designate a standby guardian for a minor where both surviving parents consent); FLA. STAT. ANN. § 744.304 (West Supp. 1996) (allowing Florida courts to appoint a standby guardian for minor children where all surviving parents petition and/or consent to the appointment); 755 ILL. COMP. STAT. ANN. § 5/11-8.1 (Smith-Hurd Supp. 1997) (allowing a parent in Illinois to designate and a court to appoint a standby guardian for a minor child); MD. CODE ANN., EST. & TRUSTS §§ 13-901 to 13-908 (1991 & Supp. 1997) (permitting a parent to designate a standby guardian); N.J. STAT. ANN. §§ 3B: 12-1 to 3B: 12-4 (West. 1997) (recognizing an imperative need in New Jersey to permit a custodial parent or legal custodian to establish a standby guardianship); N.Y. SURR. CT. PROC. ACT LAW § 1726 (West Supp. 1997) (allowing a parent in New York to create standby guardianship for minor children to take effect upon the parent's death or incapacity); N.C. GEN. STAT. § 35A-1373 (1995) (allowing a parent in North Carolina to designate a standby guardian); WIS. STAT. ANN. § 880.36 (1991 & West Supp. 1997) (establishing standby guardianship in Wisconsin).

38. I first used this profile in *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 MD. J. CONTEMP. LEGAL ISSUES 249, 253 (1995-96), in which I analyzed the Maryland "standby guardian" law, as set forth in MD. CODE ANN., EST. & TRUSTS §§ 13-901 to 13-908 (1991 & Supp. 1995). There, I explained that the profile is a composite of a single-mother based on my work as a Visiting Associate Professor of Law at the University of Maryland School of Law during the 1994-95 academic year. While there is no typical client, the composite reveals common client characteristics, needs, and the context within which a client lives her life.

39. The Maryland state legislature intended to establish "a procedure for the appointment of a standby guardian . . . of a minor child of a parent for whom there is a significant risk of dying or becoming incapacitated." Act of May 26, 1994, ch. 574, 1994 Md. Laws 2659, 2659-60. According to Susan L. Waysdorf, New York's standby guardian law was enacted to respond to the large numbers of New York mothers with HIV and/or AIDS. *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. J. WOMEN & L. 145, 207 (1994).

give up her guardianship rights to her child in order to empower her sister to be Sheila's guardian.

To ameliorate the harshness of this situation, to provide stability for children, and to reduce demands on the state to provide foster care, states enacted standby guardian laws.³⁹ These laws create a single exception to the traditional prohibition against a parent sharing joint guardianship with anyone other than the child's other natural parent. The exception allows only those who are terminally ill, or those who anticipate physical disability or mental incapacity because of terminal illness, to empower another adult to hold joint guardianship rights. This provides backup during a parent's period of disability, incapacity, and at her death.⁴⁰ Such statutes share two essential characteristics: they limit their application to parents who are terminally ill, and they permit parental nomination through a document with legal requirements similar to the execution of a will.

New York was the first jurisdiction to embrace this more flexible form of guardianship, terming it "standby guardianship."⁴¹ The New York law permits a parent who expects to die or to become disabled or incapacitated within two years to nominate a guardian for her minor children without giving up her parental rights. The law vests the guardian with immediate, albeit latent, authority for the child, permitting the guardian to consent to medical care or to enroll the child in school, without depriving the parent of her rights.⁴² The guardianship becomes effective when the parent dies, becomes mentally incapacitated, or gives consent when she becomes physically debilitated. The law's focus on terminal illness and future incapacity or disability stems from the New York legislature's reaction to the devastating effects of the dual epidemics, AIDS and intravenous substance abuse.⁴³ However, the law stops short of empowering single parents to share guardianship.

Following New York's lead, Maryland adopted a similar law in 1994.⁴⁴ Its goal was to establish "a procedure for the appointment of a standby guardian . . . of a minor child of a parent for whom there is a significant risk of dying or becoming incapacitated."⁴⁵ It borrowed its structure and terminology from the

40. The District of Columbia responded to the crack and AIDS crisis with a narrower reform. It permits parents, legal guardians, or legal custodians to authorize another adult to consent to medical, surgical, dental, or mental health treatment for children in their care. Accordingly, it requires health care providers to accept these authorizations, but exempts the providers from liability for relying on them. D.C. CODE ANN. § 16-4901 (1993).

41. See N.Y. SURR. CT. PROC. ACT LAW § 1726 (West Supp. 1996).

42. See *id.*

43. The National Commission on AIDS characterized AIDS and substance abuse as the "[t]win epidemics." NATIONAL COMMISSION ON AIDS, REPORT ON THE TWIN EPIDEMICS OF SUBSTANCE ABUSE AND HIV (1991). Legal scholars also characterize AIDS and substance abuse as two linked epidemics. See Larry Gostin, *The Interconnected Epidemics of Drug Dependency and AIDS*, 26 HARV. C.R.-C.L. L. REV. 113 (1991); Joel F. Handler, *Women, Families, Work and Property: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375, 416 (1996).

44. See MD. CODE ANN., EST. & TRUSTS §§ 13-901 to 13-908 (1991 & Supp. 1995). I provide an in-depth analysis of this statute in an earlier article, *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 MD. J. CONTEMP. LEGAL ISSUES 249 (1995-96).

45. Act of May 26, 1994, ch. 574, 1994 Md. Laws 2659, 2659-60 (standby guardianship).

New York statute.⁴⁶ Maryland's standby-guardian law addressed the effect of such guardianship, stating, "[T]he beginning of a standby guardian's authority . . . may not, itself, divest a parent of any parental or guardianship rights."⁴⁷ Such language made explicit the rights of parents to share guardianship without sacrificing their rights to their children.

Studying the framework of the Maryland and New York laws provides insight into the intent of the legislators. Both provide two methods that a parent can use to vest legal authority for her child in another adult. The legislatures designed the laws to make it easy and quick for a parent to create a standby guardianship. This change reflects the legislatures' awareness of the kind of emergencies often experienced by ill single parents. The laws permit a parent to petition a court to appoint a standby guardian⁴⁸ or to designate a particular standby guardian.⁴⁹ Ultimately, however, because the standby-guardian statutes are limited to terminally-ill single parents, they are not effective reforms of guardianship law for the typical single parent. The most common single parent is a mother with a child or two; generally, the child's father is rarely involved on a consistent enough basis to supply the guardianship backup enjoyed by intact, nuclear families.

D. *Coguardianship*

Connecticut adopted a form of guardianship that its legislature termed coguardianship.⁵⁰ Under this scheme, a parent or guardian who is a child's sole guardian may petition the court to appoint another adult to serve as a coguardian.⁵¹ This statute provides a means by which single parents who are sole guardians can create the benefits of shared guardianship with another adult, which is typically permitted only for biological or adoptive parents. For those who can take advantage of the statute, however, it does allow the parent to share the rights and obligations of the coguardian.⁵² It permits parents and coguardians to exercise their powers independently or jointly.⁵³ The statute acknowledges that conflicts between the parent and the coguardian may arise. In the event that conflicts arise, the statute states that either party can submit the dispute to the court.⁵⁴

However, limiting coguardianship to sole guardians reduces its usefulness. Most single parents are not the only guardian of their children. Rather, the law presumes that a parent shares guardianship with the other biological parent. Such

46. N.Y. Surr. Ct. Proc. Act Law § 1726 (West Supp. 1996).

47. Md. Code Ann., Est. & Trusts § 13-907 (a) (1991 & Supp. 1997).

48. See Md. Code Ann., Est. & Trusts § 13-903 (1991 & Supp. 1995).

49. See *id.* at § 13-904.

50. See Conn. Gen. Stat. Ann. § 45a-616(b) (West 1998), which provides: "If any minor has a parent or guardian, who is the sole guardian of the person of the child, the court . . . may, on the application of the parent or guardian . . . appoint one or more persons to serve as coguardians of the child."

51. See *id.*

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.* at § 45a-616(e).

a restriction on the application of the statute ignores the fact that most single parents require a more flexible option. For example, if a single parent was never married and the noncustodial parent of the child is alive and shares natural guardianship rights, she will not be a sole guardian. Thus, the statute will be of no use to her. A custodial parent needs a statute that does one of three things: allows the other parent to consent to a coguardianship arrangement, allows the custodial parent to prove that the other parent cannot be located to give consent, or allows the custodial parent to prove that the other parent has failed to act responsibly toward the child, and therefore has forfeited his or her guardianship claim. This statute provides none of these options, and its usefulness is limited accordingly.

An interesting aspect of the Connecticut statute is that it explicitly provides that upon the death of the sole parent or guardian, any guardian appointed upon the request of the dying parent or guardian will become the sole guardian.⁵⁵ The statute recognizes that, in cases where only one parent has sole guardianship rights, such parents and their children need the security created by coguardianship, because it permits the coguardian to become the sole guardian automatically upon the parent's death.⁵⁶ At the initial appointment of the coguardian, the court must assess whether or not the person will be a satisfactory guardian.⁵⁷ If the child is over the age of twelve or sufficiently mature, the court must consider the child's preference for a guardian.⁵⁸ The court also must consider whether there is an existing relationship between the potential guardian and the child.⁵⁹ Finally, the court must determine the best interests of the child and act accordingly.⁶⁰

Although relatively few Connecticut single parents will benefit from the coguardianship option as it currently exists, the statute does launch a dialogue about why other single custodial parents and their children would also benefit from shared guardianship. This Article returns to the Connecticut coguardianship statute when it explains concurrent guardianship. However, two other topics for sharing authority for legal decisionmaking for children need to be explored first. In the following two sections, this Article examines the role of the power of attorney and new forms of authorizing medical treatment and school enrollment.

E. *Power of Attorney*

Power of attorney is a familiar and convenient tool by which a competent adult authorizes another adult to act on his or her behalf. In its traditional common law form, the power of attorney has two limitations relevant to this discussion. First, the power of attorney is operative only as long as the principal adult had the

56. *See id.* at § 45a-616(e) (stating, "Upon the death of the parent or guardian, any appointed guardians . . . shall become the sole guardians or coguardians of . . . that minor child.").

57. *See id.* at § 45a-617.

58. *See id.*

59. *See id.*

60. *See id.*

capacity to make decisions and act on her own behalf. As soon as she dies or becomes incapacitated, the power of attorney ends. The result is a paradox. At a time when a person most needs to rely on another to act on her behalf, the law eliminates that possibility. Thus, the traditional power of attorney is useless for planning for the time when an adult would become incapable of making decisions. Second, the common law is unclear about the use of the power of attorney to authorize another to care for and to make decisions on behalf of one's child.⁶¹ Schools generally do not accept a power of attorney in place of the required parental authority or guardianship. Together, these two limitations render the power of attorney useless for a parent who wants to authorize another adult to care for her child when she is no longer able to do so.

Recognizing the first limitation as contrary to common sense, the Commissioners added to the Uniform Probate Code (UPC) a "durable power of attorney," one that continues despite the principal's incapacity.⁶² In addition, it created the Uniform Durable Power of Attorney Act (UDPAA), which includes the same durable power of attorney as the UPC, but is an independent act that states could adopt without having to adopt the UPC. The Commissioners commented that they intended to create "non-court regimes" to be used by principals to plan for "incompetency or disability."⁶³ Every jurisdiction in the United States, including the District of Columbia and the Virgin Islands, has now adopted some form of the durable power of attorney, thereby allowing powers of attorney to continue in cases of a principal's incapacity to make decisions.⁶⁴

61. For a further discussion on the legal ambiguities surrounding power of attorney and decision-making on behalf of children, see Joyce McConnell, *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 MD. J. CONTEMP. LEGAL ISSUES 249, 254 (1995-96).

62. UNIF. PROBATE CODE § 5-501 (amended 1993), 8 U.L.A. 418 (1998).

63. Prefatory Note, UNIF. DURABLE POWER OF ATTORNEY ACT, 8A U.L.A. 310 (1993); Prefatory Note, UNIF. PROBATE CODE, § 5-501 (amended 1993), 8 U.L.A. 418 (1998).

64. ALA. CODE § 26-1-2 (1975); ARIZ. REV. STAT. §§ 14-5501, 14-5502 (1995); CAL. PROBATE CODE §§ 4124 to 4128, 4206, 4304, 4305 (West 1997); COLO. REV. STAT. ANN. §§ 15-14-501, 15-14-502 (West 1997); DEL. CODE ANN. tit. 12, §§ 4901 to 4905 (1982); D.C. CODE ANN. §§ 4901 to 4905 (1981); HAW. REV. STAT. §§ 551D-1 to 551D-7 (1993); IDAHO CODE §§ 15-5-501 to 15-5-507 (1982); KAN. STAT. ANN. §§ 58-610 to 58-617 (1996); KY. REV. STAT. ANN. § 386.093 (Banks-Baldwin 1998); ME. REV. STAT. ANN. tit. 18-A, §§ 5-501, 5-502 (West 1979); MASS. GEN. LAWS ANN. ch. 201B, §§ 1 to 7 (West 1998); MICH. COMP. LAWS ANN. §§ 700.495, 700.497 (West 1997); MINN. STAT. ANN. §§ 523.07, 523.08 (West 1997); MISS. CODE ANN. §§ 87-3-101 to 87-3-113 (1998); MO. ANN. STAT. §§ 404.700 to 404.735 (West 1997); MONT. CODE ANN. §§ 72-5-501, 72-5-502 (1995); NEB. REV. STAT. §§ 30-2664 to 30-2672 (1989); N.M. STAT. ANN. §§ 45-5-501, 45-5-505 (Michie 1978); N.D. CENT. CODE §§ 30.1-30-01 to 30.1-30-06 (1985); OKLA. STAT. ANN. tit. 58, §§ 1071-1077 (West 1998); 20 PA. CONS. STAT. ANN. §§ 5604 to 5606 (West 1998); S.C. CODE ANN. §§ 62-5-501 to 62-5-505 (Law. Co-op. 1997); TENN. CODE ANN. §§ 34-6-101 to 34-6-107 (1988); TEX. PROB. CODE ANN. §§ 481 to 506 (West 1997); UTAH CODE ANN. §§ 75-5-501, 75-5-502 (1953); V.I. CODE ANN. tit. 15, §§ 1261 to 1267 (1991); W. VA. CODE §§ 39-4-1 to 39-4-7 (1986); WIS. STAT. ANN. § 243.07 (1981).

The jurisdictions listed above adopted the Uniform Durable Power of Attorney Act. The following jurisdictions have fashioned their own durable powers of attorney acts: ALASKA STAT. § 13.26.35c (Michie 1985); ARK. CODE ANN. §§ 28-68-201 to 28-68-203 (Michie 1987); CONN. GEN. STAT. ANN. § 45a-562 (West 1993); FLA. STAT. ANN. § 40-709.08 (West 1988); 755 ILL. COMP. STAT. 45/2-1 (West 1992); IND. CODE ANN. § 29-3-1-5 (West 1994); MD. CODE ANN., EST. & TRUSTS §§ 13-601 to 13-603 (1997); N.J. STAT. ANN. § 46:2B-8 (West 1989); N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney 1989); N.C. GEN. STAT. §§ 32A-8 to 32A-14 (1983); OHIO REV. CODE ANN. § 13-1337.09 (Banks-Baldwin 1996); OR. REV. STAT. § 13-127.005 (1996); S.D. CODIFIED LAWS §§ 59-7-2.1 to 59-7-2.3 (Michie 1977); VT. STAT. ANN. tit. 14, § 3051 (1997); VA. CODE

F. *Delegations of parental authority for limited purposes: Medical care and School Enrollment*

Two jurisdictions, California and the District of Columbia, permit parents to delegate authority for certain purposes. California provides for "authorization affidavits," through which a custodial parent can authorize a caregiver to enroll a child in school and consent to medical care that is "school-related."⁶⁵ School-related medical care includes immunizations and physical examinations necessary to enroll a child in school.⁶⁶ If the caregiver is a relative, he or she may also consent to dental care and mental health treatment.⁶⁷ The California legislature also provided that caregivers who are relatives may authorize other adults to consent to medical or dental care.⁶⁸

By enacting these two statutes, the California legislature provided for the sharing of legal authority in the most critical areas for parents and their children. Significantly, the legislature also recognized that the process for authorization needs to be accessible and not involve the courts. Thus, a parent or a relative caregiver can authorize another adult through a self-executed affidavit.⁶⁹ The affidavit form, which is written into the statute by the legislature, is simple and clearly structured. The form follows the requirements of the statute and provides that the authorization does not affect the rights of parents or legal guardians.⁷⁰ It also includes notices that the affidavit is effective for one year, and that health care providers cannot be held civilly or criminally liable for providing health care based on the affidavit.⁷¹

The District of Columbia statute is similar, but more limited in that it pertains only to medical treatment.⁷² It allows a parent or legal guardian to authorize an adult caregiver "to consent to medical, surgical, dental, developmental screening and/or mental health examination or treatment."⁷³ Unlike the California statute,

ANN. § 11-9.1 (Michie 1995); WASH. REV. CODE ANN. § 11-11.94.010 (West 1987); WYO. STAT. ANN. §§ 3-5-101 to 3-5-102 (Michie 1977).

Several states limit their durable powers of attorney to health care. GA. CODE ANN. §§ 31-36-1 to 31-36-13 (1982); IOWA CODE ANN. §§ 4-2-144B.1 to 4-2-144B.12 (West 1997); NEV. REV. STAT. ANN. § 40-449.810 (Michie 1987); R.I. GEN LAWS §§ 23-4.10-1 to 23-4.10-11 (1956).

Louisiana provides for a custodial trust. LA. REV. STAT. ANN. § 2260.7 (West 1998)

65. CAL. FAM. CODE § 6550 (WEST 1981).

66. *Id.* at § 6550 (a).

67. *See id.*

68. *Id.* at § 6910.

69. *Id.* at § 6552.

70. *Id.*

71. *Id.*

72. D.C. CODE ANN. § 16-4901 (1981) (permitting parent or guardian to authorize another adult to consent to a minor's medical care).

73. D.C. CODE ANN. § 16-4901(A).

74. *See, e.g.,* Bartlett, *supra* note 18; Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245 (1985); Laurence C. Nolan, *Honor Thy Father and Thy Mother: But Court-Ordered Grandparents Visitation in the Intact Family?* 8 BYU J. PUB. L. 51 (1993); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

the District of Columbia statute is not limited to a one-year period, nor does it distinguish between nonrelated and related caregivers to determine the extent of their authority. To this extent, the District of Columbia statute is more expansive than the California statute. However, it is less inclusive because it does not address the authority to enroll a child in school. As a whole, the District of Columbia statute is incomplete and not as well-drafted as the California statute. Even the form authorization provided in the District of Columbia statute is not as complete and easy to follow as the California form. While it does include a provision exempting health care providers from civil liability for reasonably relying on the authorization, the District of Columbia provisions do not expressly state that the authorization does not affect the rights of parents.

Despite their differences, the statutes in California and the District of Columbia represent a movement that facilitates parental authority for other caregiving adults. Both statutes provide accessible, self-executed means by which parents can provide for some additional security for their children when they are cared for by other adults. These statutes may mark the beginning of a development toward less formal requirements of guardianship. However, they do not go far enough. The following section reviews current scholarship on guardianship rights and proposes a new legal regime, concurrent guardianship, which attempts to continue the of expanding options for shared legal authority for children.

III. CURRENT SCHOLARSHIP

Family law scholars and gender theorists have written extensively about existing family law and its inadequacies. This scholarship tends to focus on the rights of three different parties with interests in the well-being of children: the state, particularly its power to intervene when a nuclear family ceases to meet the needs of the children;⁷⁴ non-custodial biological parents, and their rights and duties;⁷⁵ and third parties, who have interests in continuing legal relationships with others' children.⁷⁶ Some family law scholars, however, do explore the problems created for parents who do not live in the traditional nuclear family and who therefore are not privileged by the shared guardianship the law confers on natural parents. A single parent's primary disadvantage is that she shares

75. See, e.g., Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485 (1996); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49 (1996).

76. See, e.g., Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045 (1996); Nancy D. Polikoff, *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 (1990); Richard S. Victor, *When Third Parties Come First: Asserting the Custodial Rights of Nonparents*, 12 FAM. ADVOC. 8 (1989); Comment, *Third Party Custody and Visitation: How Many Ways Should We Slice the Pie?*, 1 DET. C.L. REV. 162 (1989).

guardianship with an absent parent, and this bars her from establishing and sharing guardianship rights with any other adult.

Professor Katharine Bartlett, a family and gender theorist, made a similar point in one of the earliest and most fundamental theoretical works on family structure and the need for change in family law.⁷⁷ In *Rethinking Parenthood As An Exclusive Status: The Need For Legal Alternatives When The Premise of the Nuclear Family Has Failed*, Professor Bartlett rejects the notion that parenthood should be exclusive. Demonstrating how the law defines the relationship of parents to children as exclusive, she reveals how the law refuses to recognize that adults other than a child's parents may play an important role in the child's life. She argues that the law should recognize a child's need for on-going relationships with his or her biological parents, as well as other psychological parents,⁷⁸ and that the law cannot do this as long as it adheres to exclusive definitions of parenthood. She describes the large number of children who do not live in traditional nuclear families, who become attached to other adults who are not their parents, and for whom the law provides "no satisfactory means of accommodating such extra-parental attachments."⁷⁹ To support her argument, Professor Bartlett discusses the negative effects of "exclusive parenthood"⁸⁰ on visitation, custody, and adoption.⁸¹ She proposes alternatives that permit recognition of de facto parenting relationships, while maintaining the child's relationships with natural or legal parents.⁸²

Rethinking Parenthood provides a foundation for extending the concept of nonexclusive parenthood. However, Bartlett's concept of nonexclusive parenthood advises recognizing only established relationships between children and their psychological parents.⁸³ For many single parents and their children, however, Bartlett's proposal is too narrow. Whether a child has a psychological relationship with another adult should not govern a parent's right to share guardianship rights with another adult. While it would be ideal for a child to have a relationship with the adult selected by the parent, it should not be the deciding factor, as Bartlett proposes. In contrast, I argue that fully empowering parents to meet their needs to share legal authority for their children must include inchoate relationships planned by the custodial parents. Thus, I propose that the law recognize concurrent guardianships between a legal parent and a non-parent,⁸⁴

77. See Bartlett, *supra* note 18.

78. Professor Bartlett defines a psychological parent for her theory of non-exclusive parenthood as an adult who meets the following criteria: (1) physical custody of the child for at least six months; (2) mutuality, where the adult expresses "genuine care and concern for the child" and "the child perceives the adult's role to that of [a] parent;" and (3) "the relationship with the child began with the consent of the child's legal parent or under court order." *Id.* at 946-47.

79. See *id.* at 881.

80. *Id.* at 886.

81. See *id.* at 911.

82. See *id.* at 944.

83. Bartlett attributes the term "psychological parent" to J. GOLDSTEIN, ANNA FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 17-20 (1979). *Id.* at 946 n. 310.

84. Professor Bartlett states that her concept of nonexclusive parenthood builds on the work of others. *Id.* In referring to guardianship she relies on a student note, Anne E. Ross, Note, *Stability in Child-Parent*

whether the psychological parenting relationship is established or only planned. To this extent, I orient this project from the perspective of the custodial parent.⁸⁵ I assume, as the law does, that custodial parents generally are concerned about their children and make wise decisions about how to care for them. To this extent my proposal is modest; I ask only that the law recognize that single, custodial parents are as wise and caring as their counter-parts in intact nuclear families.

Bartlett's concept of nonexclusive parenthood marked the start of proposals by family law scholars. Employing Bartlett's nonexclusivity theory, Professor Karen Czapanskiy proposes a paradigm shift in family law, a move away from parental exclusivity and autonomy and toward a valuing of interdependency among adults living in extended families.⁸⁶ Professor Czapanskiy⁸⁷ explores and recognizes the need for grandparents who co-parent their grandchildren to possess legal authority for their grandchildren.⁸⁸ She recommends a coguardianship contract as a privately ordered alternative to state-involved authority shifting, like foster care and adoption.⁸⁹

Professor Czapanskiy advises that only resident grandparents, those sharing a home with their grandchildren, be permitted to enter into such a coguardianship agreement.⁹⁰ Once again, this proposal for expanded parenthood limits itself to those situations where a psychological parenting relationship already exists. Czapanskiy's idea also narrows the possibilities Bartlett presents by making the arrangement available only to grandparents who reside with their grandchildren. While this proposal addresses the needs of parents, caregiving grandparents, and children to legitimate the status quo, it is silent about the needs of single parents to include other adults in future plans for the care of their children.

In her book, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, Professor Martha A. Fineman presents the culmination of her theory, arguing that the law should recognize caretaking dyads. Professor

Relations: Modifying Guardianship Law, 33 STAN. L. REV. 905 (1981). This note addresses state-created, long-term guardianships as substitutes for foster care, but does not discuss parentally-created guardianships. The author states, "These guardians have permanent custody, but must allow the biological parents to maintain a residual relationship with the children." *Id.* It is important to read this in the narrow context to which it applies, which is long-term guardianships authorized by particular state statutes. *Id.* at 906 n.5. It should not be read more broadly as pertaining to guardianships in general, or accurately describing the rights of a parent once the parent or the state creates a guardianship.

85. *Id.* at 1319.

86. *See id.* at 1321.

87. Professor Czapanskiy's related family law articles explore parental rights and duties and the relationships of third parties, particularly grandparents, to children. See, for example, Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994) (proposing a co-guardianship contract between parents and grandparents and increasing rights of co-residential three-generation families to care for their children); *Babies, Parents, and Grandparents: A Story In Two Cases*, 1 AM. U. J. GENDER & L. 85, 87 (1993) (examining the role that race, gender, and class ideology play in judicial interventions in cases involving parents, children, and their grandparents); and *Volunteers and Drafts: The Struggle For Parental Equality*, 38 UCLA L. REV. 1415, 1416 (1991) (proposing "a reconceptualization of parenthood which places on parents an ungendered responsibility to provide a child with all the support of which a parent is capable").

88. *See Czapanskiy, Grandparents, supra* note 87, at 1316.

89. *See id.* at 1319.

90. *See id.* at 1322.

Fineman uses the mother-child dyad as a metaphor for the caretaking dyad. In doing so, she rejects the essential family unit as the heterosexual family of mother, father, and children.⁹¹ Re-visioning family and family law, she proposes two meta-changes. She calls for the end of marriage as a legal category and proposes that the law recognize caretaking units that include dependent adults as well as dependent children. Recognizing that women generally are the caretakers in existing dyads, she acknowledges the critical role that family members, typically women, provide not only to children, but to elderly and ill relatives.⁹²

Although Professor Fineman does not address the subject of this Article, shared temporal and substantive guardianship of children, she provides a theoretical framework through which the law would not privilege the heterosexual family. Concurrent, temporal, and substantive guardianship rights between a legal parent and a non-parent fit within this theory. This Article offers one example of how Professor Fineman's proposal demands micro-reform, particularly of guardianship laws, to provide her proposed caregiving units the rights of shared guardianship.

Other scholars, particularly those writing about lesbian and gay parenting, provide portraits of nonheterosexual family units that suffer from the law's refusal to extend the privileges of the heterosexual family. Professor Ruthann Robson challenges the supremacy and legal privilege of the heterosexual family. In lesbian legal theory, Professor Robson demonstrates how the law discriminates against lesbian or gay parents, their partners, and their children.⁹³ Her work creating a lesbian jurisprudence provides a framework for other scholars to examine specific instances of the law's discriminatory treatment of lesbians, gay men and the children they parent.

Professor Nancy Polikoff's article, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, demonstrates the difficulties faced by nontraditional families penalized by the narrowness of exclusive parenthood.⁹⁴ She focuses on lesbian-mother families at the point of the dissolution of the

91. MARTHA A. FINEMAN, NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 8 (1995) (introducing the mother/child dyad as a caretaking metaphor as the "intimate connection to be protected and subsidized by state policy and law . . . replac[ing] the historic dyad of the heterosexual married couple as the core intimate family unit").

92. Fineman states, "'Inevitable dependency' is the term used to describe the status of need for caretaking embodied in the young, many of the elderly and disabled, as well as the ill." *Id.* at 8.

93. See generally Ruthann Robson, *Embodiment(s): The Possibilities of Lesbian Legal Theory in Bodies Problemattized by Postmodernism and Feminisms*, 2 LAW & SEXUALITY 37 (1992); Ruthann Robson, *Lesbian Jurisprudence?*, 8 LAW & INEQ. J. 443 (1990) (introducing lesbian legal theory). For work specifically addressing lesbians and their children, see Chapter 11, *Lesbians With Children in LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 129-41* (1992) (examining the law's treatment of lesbians as mothers in contests between biological fathers or lesbian partners); *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1413 (1994) (explaining that the concept of lesbians and gay men as that of a third sex and that of lesbian partners as third parties sharing similar characteristics that can advantage or disadvantage lesbians in their relationships with children).

94. Nancy Polikoff, *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 (1990).

lesbian relationship to illustrate the effect of exclusive parenthood in one form of a nontraditional family. For “[i]n the dissolution of a lesbian-mother family, the contestants stand as a parent and a nonparent, a legal status inconsistent with their functional status.”⁹⁵ Thus, she focuses on providing courts a means of resolving legal disputes over the relationship of the nonbiological parent to the child when the relationship between the two mothers dissolves.

IV. PROPOSED GUARDIANSHIP SOLUTION TO MEET DIVERSE FAMILY FORMS

A. *Reality*—“*The Way We Never Were*”⁹⁶ / “*The Way We Are*”⁹⁷

1. *Family form entering the 21st Century*

Families are diverse, mutable, and dynamic: there is no single prevalent family form. I use mutability to describe the plasticity of family form, and dynamism to capture the propensity of family form to change over time. Given this reality, we must recognize that current guardianship law cannot meet the needs of most contemporary families. Admittedly, there are many intact procreative or adoptive nuclear families. Even these families, however, alter form because of death, divorce, or abandonment. Other families begin as single-parent families living autonomously. These also change, adding an intimate partner who takes on a parenting role, or by adding extended family or friends. Families are not static; they change as they respond to events and needs. Given the diversity, mutability, and dynamism of family form, the law should not continue to privilege normative nuclear families over families of shared guardianship.

One may ask the question of whether family structures have changed through history, and if so, whether this mutability triggers the need for reform in family law.⁹⁸ The response to this question is complex. First, it is true that for a brief time in recent history, the 1950s and 1960s, the intact nuclear family was more prevalent than it is now.⁹⁹ However, it was only the predominant family form for a short period of time. Prior to the 1950s and the 1960s, and certainly for the last thirty years, diversity of family structure was and is the norm.¹⁰⁰ Second, because the ideology of the normative nuclear family has been so strong, it is difficult to determine the reality of contemporary family structures.¹⁰¹ One apparent change is the move away from studies being limited to white middle and upper-class

95. *Id.* at 463.

96. *Supra* note 1.

97. *Id.*

98. I limit this inquiry to the United States.

99. *THE WAY WE NEVER WERE*, *supra* note 1, at 23-41.

100. *See id.* at 25-26 (discussing how the “traditional” family of the 1950s was a “qualitatively new phenomenon” to most people, and that it was understood by most to be a “fairly new invention” then). *See also* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991) (discussing statistical proof that the “traditional nuclear family is rapidly becoming an American anachronism”).

101. *See THE WAY WE NEVER WERE*, *supra* note 1, at 8-22.

families. However, studies have failed to recognize that even white middle-class families have had more diverse structures than acknowledged previously by historians. Ultimately, I respond to the question of whether family structure has changed and whether this justifies reform of guardianship law by suggesting that guardianship law was never flexible enough to meet the actual needs of families. To demonstrate the historic and current diversity of family form to support the need for guardianship reform, I direct the next subsection to quantitative and qualitative differences in family form.

2. *Differences in Family Form*

a. Quantitative Overview

Empirical research shatters the myth that the typical family form is one with a father and a mother. More than one quarter of families are single-parent families with minor children,¹⁰² and the number of this type of family is growing more quickly than any other.¹⁰³ Most single-parent families result from divorce,¹⁰⁴ the number of never-married, single-parent families is on the rise.¹⁰⁵ Almost one third of children under eighteen live in single-parent households, almost 90% of them with their mothers.¹⁰⁶ Using a “life cycle perspective . . . sixty percent of children will spend some time in a single-parent family.”¹⁰⁷

102. See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 21 (1995) (citing John Ermisch, *Demographic Aspects of the Growing Number of Lone-Parent Families*, in LONE-PARENT FAMILIES: THE ECONOMIC CHALLENGE 27, 28-30 (Elizabeth Duskin ed., 1990)). Professor Dowd reports that single-parent families increased from 11% of all households in 1970 to 15% in 1990 and that the number of single-parent families more than doubled during the 1960s and 1970s." See *id.* at 22 n.13 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-20, No. 447, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1990 AND 1989 3 (1990)).

103. See John Ermisch, *Demographic Aspects of the Growing Number of Lone-Parent Families*, in LONE-PARENT FAMILIES: THE ECONOMIC CHALLENGE 29, 45 (Elizabeth Duskin Ed., 1990)).

104. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, No. 162, STUDIES IN MARRIAGE AND THE FAMILY 16 (1989).

105. See ARLENE F. SALUTER, U.S. DEP'T OF COMMERCE, SERIES P-20, No. 478, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1993 xiii (1994) (Figure 4 shows that “never-married families accounted for 35% of all single parents in 1993, up from under 5% in 1960”).

106. See *id.* at xi.

107. Nancy E. Dowd uses the term “life cycle perspective” to capture the fact that a child is likely to live in different family forms over her lifetime. For example, a child may be born into a nuclear family, through death or divorce live for some years in a single-parent family, through the parent's remarriage, live in a step-family. Looked at from a life cycle perspective, this child will spend some of her life in a single-parent family. See Dowd, *supra* note 102, at 22-23. Statistics support Dowd's analysis. Twelve percent of children will be in a one-parent family because of premarital/nonmarital birth, 40% because of divorce; 5% because of long-term separation, 2% because of the death of a parent. See Arthur J. Norton & Paul C. Glick, *One Parent Families: A Social and Economic Profile*, 35 FAM. RELATIONS 8, 16 (1986).

108. See Dowd, *supra* note 102, at 19 & n.2

b. Quantitative and Qualitative Differences

Law privileges the heterosexual nuclear family and as a corollary stigmatizes single mothers and children.¹⁰⁸ This section describes how race, ethnicity, recent immigration to the United States, and socio-economic class are factors influencing the likelihood that an individual will be a single mother and will live in an extended family.¹⁰⁹ Race and class emerge, in this section, as the most salient predictors of who will become a single mother. This section reveals that privileging the heterosexual family disproportionately puts African American families in particular at a disadvantage. This is further supported by the fact that African Americans have a history of living within and relying upon extended kinship and friendship networks.

Using narrative and empirical data, this portion of the Article looks at extended families among Native Americans, African-Americans, recent Latino/Latina and Asian immigrants. It also examines the connection between class as a predictor of single-parenthood and the need for extended family.

Native Americans¹¹⁰ traditionally live in kinship systems that extend far beyond the nuclear family.¹¹¹ Native American tribes, however, are diverse and have many different traditions and family forms. Despite their differences, Native Americans share long-lasting effects of a federal policy that began with the assumption that many, if not all, traditional tribal structures, including the family, stood in the way of successful assimilation. A central feature of this federal policy was the practice of removing Indian children from their families and tribes for assimilation purposes.¹¹² Some were placed in boarding schools, far from their reservations,¹¹³ and others were placed in non-Indian adoptive homes.¹¹⁴

109. Ascribing difference in family form to race, ethnicity, immigrant status, or class, however, can be problematic. Misunderstanding lurks in stereotyping, generalizing, and not recognizing the intersections of race, ethnicity, immigrant status, and class. To describe connections between race, ethnicity, recent immigration and socio-economic class and extended family form is not to suggest that all Native Americans, African-Americans, Latino/Latina, and Asian immigrants or those living in poverty live in extended families. Factors such as race or ethnicity may reveal tendencies in a group, but in no way predict individual choices. Complicating this further is the wide-ranging differences within a particular group. Take Native Americans for example where significant differences in culture exist between tribes. Finally, it is difficult, perhaps impossible, to unravel causation where race, ethnicity, immigrant status, or class intersect. Yet, to understand the likely needs of individuals within these groups for sharing legal authority for children with adults who are not their parents, it is essential to use a group analysis to affect public policy through legal reform.

110. I use Native American family form in this Article only to provide an example of family diversity in the United States. Whether this Article's proposed concurrent guardianship would apply to a Native American in a particular situation is beyond the scope of this Article. The Indian Child Welfare Act of 1978 governs jurisdiction of child custody matters. 25 U.S.C.A. §1911 (West 1983). Section 1911(a) gives a tribe exclusive jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing Federal Law." Section 1911(b) provides that when a child does not live on a reservation, "the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe." The U.S. Supreme Court interprets § 1911(b) as recognizing "concurrent but presumptively tribal jurisdiction . . ." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

111. See Patrice H. Kumesh, *Transcending Frontiers: Indian Child Welfare In The United States*, 16 B.C. THIRD WORLD L.J. 17, 22 (1996).

112. See *id.*

113. See *id.* at 22-23.

Recognizing the devastation that this federal policy had on children, families, and the tribes, Congress enacted the Indian Child Welfare Act in 1978.¹¹⁵ In an attempt to halt the removal of Indian children from their families and tribes, Congress ranked the tribe's interest in the child as second only to that of a member of the child's natural family.¹¹⁶ This ranking has resulted in highly emotional adoption cases, in which Indian nations argued that adults in the tribe could not consent to the adoption of their children by Anglos, because the tribe had a familial interest in the child.¹¹⁷

Like Native Americans, African-Americans trace their roots to distinct tribes and share a history of oppression and family separation. African-Americans also have a history of living in extended families.¹¹⁸ Empirical research and theoretical scholarship support the view that in African-American culture, the genetic family is recognized but not elevated over other types of extended biological and nonbiological family relationships.¹¹⁹ Historians note that the institution of slavery, which prohibited legally sanctioned marriage and ignored biological families by separating mothers, children, and fathers from one another, forced the creation of systems of mutual support beyond the traditional nuclear family.¹²⁰ Within this extended kin and nonkin system, African-American women have cared for both their own and other's children. These "othermothers" may informally adopt children or may care for children less permanently on an as-

114. *See id.* at 23.

115. Summarizing Congressional concern about how custody decisions affected Indian children, families and tribes, Justice Brennan explained that the Indian Child Welfare Act "was the product of rising concern in the mid-1970s over the consequences to Indian children, Indian families and Indian Tribes of abusive child welfare practices that resulted in the separation for large numbers of Indian children from their families and tribes through adoption of foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). The ICWA reflects this concern requiring decision makers to decide child custody decisions using the following order of placement preferences: (1) child's family members; (2) other tribal members; (3) other Indian families. 25 U.S.C.A. §§ 1901-1963 (West 1983) Section 1915(a).

116. *See* 25 U.S.C.A. § 1915 (a)(b) (if an Indian parent loses his or her parental rights, a state court must respect the following placement preferences: (a) a member of the child's extended family; (b) other members of the child's tribe; (c) other Indian families).

117. For example, in one case an adult Indian woman gave her infant daughter to an Anglo couple for adoption, but tribal authorities seized the child and returned her to the reservation for a custody determination by the tribal court. In an interview with the representative of the American Indian Center, Kathy Youngbear argued:

While Anglo culture holds parental rights sacred, Indians also value the rights of the extended family and the tribe. . . .The Indian Child Welfare Act allows the tribe to intervene in adoption cases even against a mother's wishes. . . .These Indian kids are our future leaders.

Joan Smith, *It Was A Setup*, S.F. EXAM., Apr. 17, 1988, at A20.

118. *See* Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 42-44 (1993) Fenton discusses how the extended family tradition dates back to slavery and how "[t]he extended Black family still has a primary role today in the culture. . . ." *Id.* at 43-44.

119. *See* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 211 (1995) (using Black American culture to illustrate how to value different types of "family" other than the biological).

120. *See* HERMAN G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* 196-229 (1969) (describing slave extended-kin networks and nonkin social obligations). *See generally* KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

needed basis.¹²¹ These extended care systems continue to be an essential aspect of African-American culture today.¹²² Living in extended families is more common for African-Americans than whites regardless of whether members of the extended families are married or not.¹²³ In addition, single-parenthood is more common among African-Americans than whites.¹²⁴

While many communities of color in urban centers have been hit hard by the substance abuse and AIDS epidemics,¹²⁵ African-Americans have been hit hardest.¹²⁶ Drug and alcohol abuse and AIDS continue to strain the ability of many single parents to care for their children.¹²⁷ AIDS is now the leading cause of death of African-American women in their reproductive years.¹²⁸ When women die, many of whom are single parents, their children must be cared for by others. Grandmothers, aunts, sisters, cousins, and friends have responded to this crisis of care from the tradition of “othermothering.”¹²⁹

In addition to race, immigration and ethnicity influence family structure, single parenting, and the likelihood that a parent will rely on extended networks of friends and family to care for children. Sometimes stereotypes based on race, ethnicity, and recent immigration romanticize the importance of extended family. Data generally support this stereotype, however, revealing how fundamental extended family is in many non-American cultures. This cultural value is reinforced because recent immigrants often need to rely on the support of

121. See Roberts, *supra* note 119, at 271 (crediting Patricia Hill Collins for coining the term “othermother” in BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 119-23 (1990)).

122. See *id.* (citing ANDREW BILLINGSLEY, CLIMBING JACOB’S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES 29-31 (1992)); ROBERT HILL, NATIONAL URBAN LEAGUE RESEARCH DEP’T, INFORMAL ADOPTION AMONG BLACK FAMILIES (1977); ELMER P. MARTIN & JOANNE MITCHELL MARTIN, THE BLACK EXTENDED FAMILY 39-47 (1978); CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 62-89 (1975); Andrea G. Hunter and Margaret E. Ensminger, *Diversity and Fluidity in Children’s Living Arrangements: Family Transitions in an Urban Afro-American Community*, 54 J. MARRIAGE & FAM. 418, 418-425 (1992)). Professor Roberts also uses the work of Nancy H. Apfel and Victoria Seitz, whose research reveals that grandmothers or grandmother surrogates played mothering roles to newborns of 95% of Black adolescent mothers interviewed. *Four Models of Adolescent Mother-Grandmother Relationships in Black Inner-City Families*, 40 FAM. RELATIONS 421, 422 (1991).

123. NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 106 (1997) (stating that 44% of African Americans compared to 11% of whites, no matter the marital status, live in extended families). See also Timothy F. J. Tolson & Melving N. Wilson, *The Impact of Two and Three-Generational Black Family Structure on Perceived Family Climate*, 61 CHILD DEV. 416 (1990) (reporting that there are twice as many African-American extended families as there are white extended families).

124. See Dowd, *supra* note 102, at 22 & n.14 (1995) (quoting Household and Family Characteristics: March 1990 and 1989, BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, Series P-20, No. 447, at 1, 8-9 (1990)). Nearly two-thirds of single parents are white, but single parent families are much more prevalent among blacks. Furthermore, the most common category of single-parent families among blacks is the never-married single parent. *Id.* at 10.

125. See Waysdorf, *supra* note 39, at 159-72.

126. See *id.* at 159-61.

127. See *id.* at 168-69.J

128. See Brian W.C. Forsyth, *A Pandemic Out of Control The Epidemiology of AIDS*, in FORGOTTEN CHILDREN OF THE AIDS EPIDEMIC 19-31 (Shelley Geballe et al. eds., 1995).

129. For a snapshot of the effects of AIDS on children, their parents and caretakers, see A DEATH IN THE FAMILY: ORPHANS OF THE HIV EPIDEMIC vii (Carol Levine ed., 1993), publishing the proceedings of a 1992 conference sponsored by The Orphan Project and the United Hospital Fund on the “deepening legacy of AIDS.”

extended ethnic communities to survive in a new country. Research does show “high levels of familism,” defined as “a deeply ingrained sense of obligation and orientation to the family”¹³⁰ among immigrants. Two large and growing groups of immigrants¹³¹ are Latinos/Latinas and Asians.¹³²

Immigrants, or what one researcher refers to as “foreign born,” are “slightly less likely” to live in single-parent families, and their “children are more likely” to live with both parents.¹³³ For many immigrants, however, how recently they, their parents, or grandparents immigrated to the United States affects the likelihood of whether they live in extended families and whether they become single parents. There are differences among groups, however, with Asians living more often in families with both natural parents.¹³⁴ Added to this is the tendency of Asians to live in larger extended families.¹³⁵

In the first ten years of life in America, immigrants often live in extended families.¹³⁶ Even after ten years, however, immigrants tend to live in single-family households close to the extended family to take advantage of support.¹³⁷ While immigrants begin their lives in the United States with a greater likelihood of living in intact nuclear families along with other family members, the longer they live here, the more likely they are to be single parents.¹³⁸ Single-parenting is increasing among Latinos/Latinas.¹³⁹ Approximately 33% of Latino/Latina families are now headed by single parents.¹⁴⁰ Single-parenting is less common among Asians, although single parenthood rises among Asians as they stay longer in the United States.¹⁴¹

A pattern emerges from these empirical studies. Latinos/Latinas, Asians, and other recent immigrants often begin their lives in the United States with a high degree of interdependence with extended family. After a period of time of residency in the United States, immigrants are more likely to become single parents who continue to rely on extended family members for help in raising children.

130. Professor Rumbaut adds that this is particularly true for Mexican immigrants. See Ruben G. Rumbaut, *Ties That Bind: Immigration and Immigrant Families in the United States in Immigration and the family: research and Policy on U.S. Immigrants*, in IMMIGRANTS 35 (Alan Booth et al. eds., 1997).

131. The categories Asian and Latino/Latinas include a multiplicity of immigrants and the countries they are from. For example, for analytic reasons, Asian immigrants may include Chinese, Japanese and Thai because they share some similarities.

132. See Raymond Buriel and Terri De Ment, *Immigration and Sociocultural Change in Mexican, Chinese and Vietnamese American Families*, in IMMIGRATION AND THE FAMILY: RESEARCH AND POLICY ON U.S. IMMIGRANTS 165 (Alan Booth et al. eds., 1997).

133. Rumbaut, *supra* note 130, at 23.

134. *See id.* at 33.

135. *See id.* at 35 (using “Indochinese groups” instead of Asians).

136. *See Buriel and De Ment, supra* note 132, at 178.

137. *See id.*

138. *See id.* at 27.

139. *Housing and Family Characteristics: March 1990 and 1989*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Series P-20, No. 447, at 9 (1990).

140. *See id.*

141. *See Rumbaut, supra* note 130.

Another factor essential to this analysis is socio-economic class. Single mothers and their children are the majority of the poor in the United States.¹⁴² When one adds race to the analysis, one learns that African-American single-mothers and their children are the most likely to be poor.¹⁴³ African-American and Latina women make up approximately 45% of all single-woman headed households and 55% of those who receive public assistance.¹⁴⁴ There is a strong association between single parenthood and poverty for African-Americans.¹⁴⁵ Fifty percent of all African-American children living in single-parent families are poor.¹⁴⁶ Compare this to 20% of those children living in two-parent families.¹⁴⁷ The differential in poverty rates for white children in single-mother homes versus two-parent homes is much smaller than that for African-American children; approximately 14% for children living with single mothers compared to approximately 4% for children living with both parents.¹⁴⁸

Poverty may be the most salient predictor of who will become a never-married, single parent, particularly for teenage girls and boys.¹⁴⁹ Why young girls become pregnant, however, is complex. Single motherhood for young girls stems from cultural changes that have widened the range of options for women generally, along with the economic reality of life-long poverty for most low-income or poorly educated women.¹⁵⁰ Factors such as poverty, poor economic opportunity for both men and women, and existing inequities in power between men and women make girls vulnerable to sexual exploitation.¹⁵¹ Many pregnancies in young girls are by much older men.¹⁵² While the decreasing stigmatization of single motherhood may explain why some young women do not marry upon becoming pregnant, falling employment rates for men appear to be a significant contributing factor.¹⁵³

142. JOEL F. HANDLER & YEHESKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA*, 17 (1991).

143. *See* ANDREW HACKER, *TWO NATIONS BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL*, 86 (1992).

144. *See id.*

145. *See* SARA MCLANAHAN & GARY SANDEFURE, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS WHAT HELPS* 85 (1994).

146. *See id.*

147. *See id.*

148. *See id.*

149. The California Senate Office of Research states this succinctly, "poverty, poor school performance, and the early onset of puberty and increased sexual activity for teens are predictors of teen pregnancy." As for young girls who become mothers, the Office reports, "[w]omen who began motherhood as teenagers are more likely to have been poor, remain poor, and need welfare in the future." 15-SUM. CAL. REG. L. REP. 28, 30.

150. Sociologist Stephanie Coontz, addresses the complexity when she writes, "[t]he growth of unwed motherhood is an even more complicated story than that of divorce, because some of it stems from expanding options for women and some from worsening constraints, especially for low-income or poorly education women." *THE WAY WE REALLY ARE*, *supra* note 1, at 85.

151. *See id.* at 85.

152. Coontz reports that "men over age 20 father five times more births among junior high school girls" and that "[w]hen the mother is 12 years old or younger, the father's average is 22." *Id.*

153. Coontz's research demonstrates that the unavailability of low-skilled, living-wage jobs for men explains most of the drop in marriage rates. In other words, if men are unable to afford to marry, women are more likely to become single mothers. *See id.* at 138-39.

Low marriage rates, having children, and poverty all necessarily affect the extent to which a mother must rely and does rely on support networks of caregiving friends and kin.¹⁵⁴ If a mother is poor, is not in a relationship with her child's father, and cannot rely upon him for care, she will be forced to rely on others to care for her child. Considering the expense of childcare, she will tend to rely on family and friends, making kinship care more likely. Thus, poverty contributes to the extent to which women will need to rely on adults other than the children's fathers, and this in turn makes the need to share legal authority more pressing.

Natural guardianship, derived from the exclusive parenthood model of the married heterosexual mother and father, negatively affects all families that depart from this norm. Two diverse forms of family, step-parent and gay and lesbian families, reveal the inadequacy of current guardianship law. Many families consist of a child, the child's parent, and the parent's intimate partner who is not the child's legal parent. Step-parents and gay and lesbian co-parents living with children constitute such families. Although these two types of families are different, one outwardly similar to the heterosexual procreative family and the other distinct because of same-sex coupling, the legal relationship of the step-parent and the gay and lesbian co-parent to their partner's child is similar. Neither parent has any legal authority over the child. Without this power, the step-parent or co-parent is limited in how much he or she can do to support his or her partner in the daily tasks of parenting. More importantly, if the child's custodial parent dies or cannot care for the child, the child's other biological parent will have superior rights to the step-parent or co-parent who may have a much closer relationship to the child.

When single-parent families reconstitute themselves into step-parent families, problems caused by restrictive natural guardianship laws surface.¹⁵⁵ This family form, while sharing the dyadic pattern of heterosexual marriage, is denied the privileges of shared guardianship. Many step-parents are involved in the daily lives of their partners' children. Yet, because they do not have legal parental rights, they have no legal authority. This deprives a custodial parent the peace of mind and convenience of knowing that the other adult with whom she lives can exercise legal authority for the child they raise together. It denies the step-parent of the right to be involved fully in the care for the child. Finally, it robs the child of the stability and continuity that comes from living with two adults who are equally empowered to care for and to make decisions on behalf of the child.

Step-parent families are common; many custodial single parents marry again or live with a partner.¹⁵⁶ For some, there is no need for the step-parent to have legal authority to make decisions for the child because the other legal parent is

154. NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES, 113-14 (1997).

155. See Bartlett, *supra* note 18, at 912.

156. Census data from 1985 reveals that there were 6.8 million children living in stepfamilies. *Studies in Marriage and the Family*, U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-23, No. 162, 29 (June 1989).

present for the child. For many single parents, however, the other legal parent is not available, and many of the regular care-taking tasks are performed by the step-parent.

A narrative illustrates a common situation. Monica was in a committed, intimate relationship with Tom when she became pregnant. Monica and Tom lived together when the child was conceived and born. Monica listed Tom on her daughter's birth certificate as the father. Monica and Tom continued to live together until their daughter was seven. They separated, and Monica became the custodial parent. Tom visited the child once a month and paid child support sporadically for several years. Over time, his contact with Monica and their daughter ended, and child support dwindled to an occasional check. In the meantime, Monica married Ron and had a son. Monica, Ron, their son, and Monica's daughter now live as a nuclear family. Only Monica, however, has the legal authority to do for her daughter what parents are often asked to do for their children. This leaves Monica with the sole legal authority to take her daughter to the doctor, to enroll her daughter in school, and to give permission for school trips. This deprives Monica of any relief from these child-rearing duties, it denies Ron a full role in Monica's daughter's life, and it threatens the possibility of caretaking continuity for Monica's daughter. Furthermore, if something happens to Monica, only the absent father will have rights of custody and decisionmaking.

There are almost seven million children living with the uncertainty of not knowing what will happen to them at the time at which they will be most in need of stability and continuity of care. For a child in such a situation, if something happens to her custodial parent, not only will she face the loss of her parent, but she will also face the loss of everything familiar. She may have to leave the home they have come to know, their step-siblings, step-parent, friends, school, church, and community. Any comfort in the routine and familiar will be lost just at the time when it is most needed.

To get an accurate sense of the diversity of families, we must not assume that all families are heterosexual in origin or in evolution. Gay and lesbian families with children arise in different ways. Some men and women have children from previous heterosexual relationships and then become involved with a same-sex partner. Others choose to have children in same-sex relationships by using reproductive technologies such as artificial insemination,¹⁵⁷ or by adopting. Gay and lesbian parents' needs for planning for the future care of their children are both similar and dissimilar to heterosexual single parents. Both the step-parent and the gay or lesbian co-parent are disempowered by the law of natural guardianship, but the gay or lesbian co-parent faces unique discrimination which

157. See NATIONAL CENTER FOR LESBIAN RIGHTS, LESBIANS CHOOSING MOTHERHOOD: LEGAL IMPLICATIONS OF DONOR INSEMINATION AND CO-PARENTING 1-7 (1991); Carol A. Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-by-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 195 (1982-83); Patricia A. Kern & Kathleen M. Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent through Artificial Insemination by Donor*, 7 WOMEN'S RTS. L. REP. 251, 256 (1982); Polikoff, *supra* note 94, at 459 n.2; Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, n.1 (1985).

is legally permissible in virtually all jurisdictions in the United States.¹⁵⁸ Two hypotheticals illustrate different origins and evolutions of gay and lesbian families.

Marie had a daughter while married. She obtained custody of her daughter after her divorce and is now a single parent. Her former husband, her daughter's father, has no contact with them. Marie now lives with a same-sex partner, and they are raising Marie's daughter together. In this situation, Marie has no access to the other natural guardian of her child. However, she cannot choose to have another adult, even her partner who is now co-parenting, share guardianship rights and duties with her.

In another example, Nancy and Susan, lesbians in a long-term committed relationship, chose to have a child through artificial insemination. Nancy bears the child and is, therefore, the biological parent. The sperm donor is anonymous, most likely making Nancy the only legal parent.¹⁵⁹ Susan has no legal rights or obligations to the child, unless the state permits her to adopt the child and thereby share natural guardianship rights with the biological mother.

A review of the ways in which law abandons gay and lesbian parents and their children and discriminates against them provides perspective on their legal needs that are different from those of heterosexual single parents. While a heterosexual parent may have a child on her own, she can later choose to marry a man, and he can adopt the child, if the legal father is dead or consents. However, where the mother's partner is another woman, she cannot marry her.¹⁶⁰

158. See William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, HOFSTRA L. REV. 817, 949 (1997) (describing the explicit discrimination in law against gay and lesbian parents and its transition to standards that are objective on their face, but influenced by myths and assumptions about gay and lesbian parents and the well-being of children resulting in continued implicit discrimination in law).

159. See Tanya Feliciano, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 321 (1993) (reporting that "most states have statutes forbidding anonymous donors from claiming parental rights.") (footnote omitted); Alexa E. King, *Solomon Revisited: Assigning Parenthood In the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 349 (1995) (stating that the trend is to exempt anonymous donors from parental rights and obligations).

Section five of the Uniform Parentage Act exempts anonymous donors from parental rights and obligations where the woman is married. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987). Section 5 of the Uniform Parentage Act states:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship....

The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived. UNIF. PARENTAGE ACT § 5, 9B U.L.A. (1987).

160. Gay and lesbian couples in the 1970s tested their states' refusals to allow them to marry. Each state's supreme court rejected the argument that there was a federal constitutional right to marry that could not be denied by state law. See *Singer v. Hara*, 522 P.2d 1187, (Wash. App. 1994), *review denied*, 84 Wash. 2d 1008 (1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

In most jurisdictions, adoption by a gay or lesbian partner is not a legal alternative.¹⁶¹ This is true despite the growth of second-parent adoptions by heterosexual step-parents. Acceptance of second-parent adoptions is significant because, prior to their emergence, adoption always terminated the rights of both legal parents. This meant that there were no means by which a biological mother and a step-father could both become the legal parents of the child. Under traditional adoption, the mother's rights would be terminated, thereby vesting the sole parental rights in the step-parent. Now, however, some jurisdictions permit a second-parent adoption with termination of one legal parent's rights, leaving intact the rights of the custodial parent. Despite this evolution, gays and lesbians are often not afforded the luxury of step-parent adoption.¹⁶²

While acknowledging the similarities between the legal obstacles confronted by step-parent and gay and lesbian families, their situations are different in one essential way: the law privileges heterosexuality, heterosexual marriage,¹⁶³ and parenting by heterosexuals in traditional nuclear families. In contrast, the law discriminates against homosexuals by denying them the right to marry, and discourages parenting by gays and lesbians.¹⁶⁴

In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), it appeared that a door could open to gay and lesbian marriage in Hawaii. Federal and state reaction to the 1993 decision was rapid and strong, and legislators scrambled to pass legislation that would circumvent full faith and credit requirements. See Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 481-92 (1994) (advising states that they could not refuse to recognize other-states' same-sex marriages unless their courts or legislatures clearly articulated contrary public policy). In December 1996, a state court judge struck down the Hawaii law permitting only heterosexuals to marry, thereby opening the door to same-sex marriages in Hawaii. *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). See also Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

161. New Hampshire and Florida have statutory bans on gay and lesbian adoption and foster parenting. New Hampshire does not allow homosexuals to adopt a child. See N.H. REV. STAT. ANN. § 170(B)(4) (1994). Florida prohibits adoptions by homosexuals. See FLA. STAT. ANN. § 63.042(3) (1997). Other states without bans continue to deny gays and lesbians the right to adopt. Only New York guarantees gays and lesbians the same eligibility to adopt as heterosexuals. See 18 N.Y. COMP. CODES R. & REGS. tit.18, § 421.16(h)(2) (1992) (stating that homosexuality may not be a basis to reject applicant for adoption). However, Massachusetts permitted a lesbian life partner to adopt her partner's biological child, so that they both became the legal parents of the child. *Adoption of Tammy*, 619 N.E.2d 315 (1993).

162. Even in New York, which permits second-parent adoptions by gays and lesbians, the courts do not do so consistently. In one case, the court permitted the mother's lesbian life partner to adopt the mother's biological son. See *In re The Adoption of Evan*, 153 Misc.2d 844, 583 N.Y.S.2d 997 (N.Y. Ct. 1992). However, in a later case, a New York court refused to permit the life partner of the mother to adopt the child. See *In The Matter of Dana*, 209 A.D.2d 8, 624 N.Y.S.2d 634 (2d Dep't 1995).

163. See *Maynard v. Hill* 125 U.S. 190, 205 (1888) (finding marriage to be fundamentally a matter of the state, but acknowledging it to be "the most important relation in life, as having more to do with the morals and civilization of a people than any other institution"). In 1923, the Supreme Court stated that liberty guaranteed by the due process clause includes the right to marry. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

164. A parent's sexual orientation is often at issue in the dissolution of a marriage or heterosexual partnership where children are involved. There are disputes about custody and visitation, which are determined by the laws of the particular state. The use, however, of the parent's sexual orientation as a per se reason to deny custody or visitation occurs, but is not normative. See *Roe v. Roe*, 324 S.E.2d 691, 228 Va. 722 (1985) (holding that the sexual orientation of the parent creates an intolerable burden upon the child); *M.J.P. v. J.G.P.*, 640 P.2d 966, 967 (Okla. 1982) (finding that a parent's homosexual relationship warranted removing the child from custody). The rule applied more often is whether there is a nexus between the sexual orientation and parenting abilities. See *Fox v. Fox*, 904 P.2d 66, 69 (Okla. 1995) (finding that a lesbian's sexual orientation alone is not a basis for a custody modification); *Van Driel v. Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994)

Yet, the needs of the gay and lesbian parents and their children to have access to a caregiving adult who is empowered legally to care for the child is as essential as it is for heterosexual parents and their children. Just how many parents and children live in such situations is unknown, but we do know that there are approximately 1.5 million lesbian mothers and one million gay fathers in the United States.¹⁶⁵ Estimates of the number of children they are raising ranges from six to ten million children.¹⁶⁶

B. *Proposed Solution: Concurrent Guardianship*

To address the needs of diverse families, I propose a concurrent guardianship solution that meets four essential requirements. First, it should be available to the largest number of parents. Second, it should be a simple legal procedure. Third, it should be accessible. Fourth, it should involve the state to the least extent possible. The proposal that follows draws from existing legal guardianship options, testamentary,¹⁶⁷ inter vivos¹⁶⁸ standby guardianships,¹⁶⁹ coguardianships,¹⁷⁰ powers of attorney,¹⁷¹ and innovations in empowering nonparent caregivers to authorize medical treatment and to enroll children in school.¹⁷² These options provide the basis for my proposal for concurrent guardianship.

Concurrent guardianship may seem to be a radical departure from established guardianship principles. However, it continues the trend recognized by the Commissioners as well as state legislatures to move toward more flexible forms of guardianship and transfers of substantively and temporally limited authority for children. The proposed concurrent guardianship solution that follows is a logical move forward in this now well-established trend.

The first requirement, widespread availability, is key to concurrent guardianship. All single-custodial parents who do not have the support of an actively engaged and responsible co-parent empowered with natural guardianship rights must be able to establish a concurrent guardianship with another adult. Thus, I propose to make concurrent guardianship available to any single-custodial parent.

(rejecting a per se test and requiring a connection between the lesbian mother's conduct and harm to her children). Sexual orientation can also play a role where the contest for custody is not between biological parents, but between a biological parent and a non-parent. See *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (awarding custody of child to non-parent after acknowledging that while a lesbian mother is not per se unfit, lesbian conduct is punishable as a felony, which the court must consider as a factor).

165. See Julie S. Gottman, *Children of Gay and Lesbian Parents*, 14 MARRIAGE & FAM. REV. 177 (1989); Katja M. Eichinger-Swainston, Note, *Fox v. Fox: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families*, 32 TULSA L.J. 57, n.1 (1996).

166. *Id.* (estimating six million children raised by lesbians and gay men); *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 FAM. L. REP. (BNA) 1512, 1513 (1987) (estimating eight to ten million children live with a gay or lesbian parent).

167. See 39 AM. JUR. 2D, *supra* note 19.

168. See *id.*

169. See *supra* note 36 and accompanying text.

170. See CONN. GEN. STAT. ANN. § 45a-616(b) (West 1998).

171. See UNIF. PROBATE CODE § 5-501 (amended 1993), 8 U.L.A. 419 (1998).

172. See CAL. FAM. CODE § 6550 (a); D.C. CODE ANN. § 16-4901(A).

It should not be limited to terminally ill, disabled, or incapacitated parents. Nor should it be limited to those adults who have already established a psychological parent relationship with the child. The two qualifications that the parent must meet are: (1) The legal parent is the custodial parent; and (2) As the custodial parent, she or he is unable to rely on the other legal parent to exercise her or his natural guardianship responsibilities.

Simplicity is the second requirement. To make concurrent guardianship a real possibility for single parents, the law must be clearly written in simple English and must provide forms that are easily understood and completed. Lay people, lawyers, and legal educators complain that legal writing obfuscates meaning, rendering legal documents confusing. An effective concurrent guardianship law must overcome this common problem and include a clearly-written, simple form. The statute itself should include a model form for parents and their representatives to follow in establishing a concurrent guardianship.

Recognizing how essential these models are to parents, state legislatures included such forms in recent standby guardian laws. Concurrent guardianship laws should build on this precedent. In addition, a common practice recognized and encouraged by the Commissioners in the Probate Code and the Durable Power of Attorney Act is for lay people to draft non-complex wills and powers of attorney for their own use.¹⁷³ Following the advice of the Commissioners in the Guardianship Act, the proposed concurrent guardianship law should meet the requirements for the validity of a will.¹⁷⁴ In most jurisdictions, this means that it must be in writing, be signed by the person nominating the guardian, include the consent of any other legal parent, and be attested to by two competent adults.

1. *Rights of Noncustodial Parents*

Rights of noncustodial parents must be protected in any process that is used to create concurrent guardianship. In order to protect the constitutional rights of noncustodial parents, the proposed concurrent guardianship should require consent of the noncustodial parent or proof that his or her consent is unobtainable. Allowing another adult to be a concurrent guardian will not infringe on the existing rights of the noncustodial parent because concurrent guardianship does not terminate or limit rights. The rights of noncustodial parents depend in part on the prior relationship between the noncustodial parent and the nominating parent. For example, if the mother was married at the conception or birth of her child, her husband is presumed to be the father of the child.¹⁷⁵ His rights are clear: he must consent to the concurrent guardianship unless his rights under state law have been

173. See Prefatory Note, UNIF. DURABLE POWER OF ATTORNEY ACT, 8A U.L.A. 310 (1993); Prefatory Note, UNIF. PROBATE CODE, § 5-501 (amended 1993), 8 U.L.A. 418 (1983 & Supp. 1992).

174. See Prefatory Note, UNIF. DURABLE POWER OF ATTORNEY ACT, 8A U.L.A. 310 (1993); Prefatory Note, UNIF. PROBATE CODE, § 5-501 (amended 1993), 8 U.L.A. 418 (1993).

175. See *Michael H. v. Gerald D.*, 491 U.S. 110, 117 (1988) (holding that the state's presumption that the husband of a married woman is the father of her child is constitutional and does not violate a biological father's constitutional right to equal protection).

terminated. If he cannot be located, the nominating parent must establish that she took reasonable efforts to locate him to obtain consent.

Fathers who are unwed and who do not undertake any actions to acknowledge their children could be stripped of all parental rights.¹⁷⁶ Thus, a state permitting concurrent guardianship could require unwed fathers to establish their parental status in order to receive notification of a proposed coguardianship. Absent establishing fatherhood through legal paternity proceedings, supporting the child, or visiting the child on a regular basis,¹⁷⁷ an unwed father has no right to block the mother from creating a concurrent guardianship with another adult.

One significant benefit of concurrent guardianship to the noncustodial unwed father is that the existence of a concurrent guardian does not strip him of the inchoate rights he may wish to exercise later. Unlike adoption, concurrent guardianship does not terminate these rights. At a later time, the unwed father could establish paternity and re-enter the child's life. If he was unable at that time to exercise his concurrent guardianship rights, the concurrent guardian could continue in that role. Thus, the concurrent guardianship option preserves the unwed father's rights, provides the nominating mother the greatest flexibility, allows the concurrent guardian to continue to play a fundamental role in the child's life, and gives the child stability and consistency in her life.

Consent of the non-custodial parent may present problems for the nominating parent, which the procedure itself should address. The instrument should define who must give consent as a legal parent. Thus, it should list any person that the jurisdiction recognizes as a legal parent. Generally, questions of who is a legal parent arise when the nominating parent is the birth mother of the child. This is because maternity is unquestionable in pregnancies resulting from sexual intercourse and not from the use of alternative reproductive procedures.¹⁷⁸ If a woman was married at the time she conceived or gave birth, her husband at the time of either will be assumed by law to be the legal father of the child. If the mother was not married, but listed a man as the child's father on the birth certificate, that man will be presumed to be the legal father.

Similarly, the form should indicate who is not a legal parent and whose consent the law does not require. While this might seem obvious in cases where there is no marriage, no identification on the birth certificate, and no established

176. *See Lehr v. Robertson*, 463 U.S. 248, 264-65 (1982) (holding that an unwed father who did not register in the state's putative father registry was not denied due process when state terminated his parental rights).

177. *See Quilloin v. Walcott*, 434 U.S. 246 (1977) (holding that an unwed father who neither supported nor visited his child had no right to block adoption by child's stepfather). *But see Caban v. Mohammed*, 441 U.S. 380, 394 (1978) (holding that the sex-based distinction between the power of unmarried mothers and unmarried fathers to block adoption by withholding consent violates equal protection).

178. Historically, a birth mother's parental status was presumed. New reproductive procedures, such as in vitro fertilization and implantation challenge this presumption. *See generally Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

179. MD. CODE ANN., EST. & TRUSTS § 13-903(a)(2) (1997) (providing that "if a person who has parental rights cannot be located after reasonable efforts have been made to locate the person, the parent may file a petition for the judicial appointment of a standby guardian")

paternity, it is difficult to determine the legal father from whom consent must be obtained. The form should offer the mother clear guidance regarding whose consent she must obtain.

The following example is a nominating mother in need of clarification of who qualifies as a legal father. The mother was not married at the time the child was conceived or born. She did not indicate the father's identity on the birth certificate. However, she acknowledges, and her family and friends agree, that the father is probably John Smith because the child looks somewhat like him. She dated John Smith and several other men during the period in which she conceived. John Smith has not acknowledged the child to be his, does not see the child, and does not contribute to its support. It is important that this mother know that John Smith is not the legal father who must give consent.

Where a legal parent whose consent is required cannot be located, the concurrent guardianship proposal provides for an alternative. Standby guardianship statutes address this issue, although somewhat inadequately. For example, the Maryland Standby Guardian Act allows a nominating parent to substitute the other legal parent's consent with proof that he or she made reasonable efforts to locate the parent to obtain consent.¹⁷⁹ The statute is inadequate because it does not define "reasonable efforts," making it difficult to predict what efforts a court will find reasonable. A concurrent guardianship law should list the efforts required to meet the reasonable efforts test. These efforts might include contacting the person's last known address, the Post Office, asking family members and friends for a forwarding address, and checking places of employment, state motor vehicle administration, local telephone directories, child support agencies, jails, prisons, and voter registration records.

Where there is a history of violence perpetrated by the absent parent against the nominating parent, and where she believes that obtaining consent will endanger herself or her child, the concurrent guardianship law should exempt the nominating parent from obtaining the consent of the absent parent.¹⁸⁰ To qualify for this exemption, the nominating parent should be required to attach an affidavit to the nominating instrument indicating the basis for her fear of continued violence. It should include the past history of violence, including number of incidents and injuries, and any medical, police, or shelter records. The possibility of this consent exemption should be included in the form. In addition, alternative procedures to be used by a court should be developed to meet the constitutional rights of the absent parent while protecting the location of the nominating parent, guardian, and child. Recognizing that the nominating parent, typically the mother of the child, may have been battered in the past by the absent father, incorporating an exemption into a

180. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (discussing how the legal system must do more to protect women who are at the point of, or after, separation from their batterers).

181. See *Violence Between Intimates: Selected Findings*, BUREAU OF JUSTICE STATISTICS, NCJ-149259, at 2 (Nov. 1994) (reporting that women with family incomes under \$9,999 had the highest rates of violence attributable to an intimate while those with incomes over \$30,000 had the lowest rates).

concurrent guardianship law is crucial. Recent research establishes a link between poverty and domestic violence.¹⁸¹ Thus, parents who are more likely to need concurrent guardianship may also be more likely to be domestic violence victims in need of protection.

2. *Conflicts Between Guardian and Parent*

In a contest between the noncustodial uninvolved parent and the involved concurrent guardian, the court would have to decide who should have custody and/or primary legal authority for the child. To decide this question, the court should determine what would be in the best interests of the child. Conflicts between the custodial parent and the guardian are more problematic because both have legal authority, but in a contest between the two, the custodial parent's constitutional rights would be superior.¹⁸² This assumes that an able custodial parent should retain the right to revoke the concurrent guardian's authority. This flexibility is essential as people, relationships, and needs change over time.

Once a parent establishes a concurrent guardianship, the concurrent guardian has the same legal right as a natural guardian, except that he or she cannot consent to adoption, is not liable for economic support, and the child cannot inherit from her under intestacy statutes. The concurrent guardian remains in the role as long as the nominating parent wishes, or until the concurrent guardian withdraws as guardian. To make termination as simple as nomination, the law should clearly describe the process for revocation by the parent or withdrawal by the guardian and should include a model form.

Making it easy to establish concurrent guardianships raises concerns about creating additional instability in a child's life. This concern stems from the assumption that single parents are likely to change guardianship for valid and not-so-valid reasons, but there is no empirical data to support this. Unfortunately, however, there is also none to refute it. Until such data is available, I suggest that we assume that most single women will make sound decisions on behalf of their children. While this sounds radical, the law historically has had confidence in parents to do what is best for their children. Single women deserve the benefit of this confidence.

Beginning with the assumption that single mothers will make decisions in their children's best interests, it follows that women will nominate concurrent guardians for reasons that they believe will benefit their children. This assumes that a custodial parent, who is not mentally incapacitated, should retain the right to revoke the concurrent guardian's authority. This flexibility is essential as people, relationships, and needs change over time. Even if this appears as if it might create instability for children because they may have a series of concurrent guardians, the

182. Parents have a "fundamental liberty interest" in the care, custody, and management of their child. *Santosky v. Kramer*, 455 U.S. 745, 753 (1981).

183. UNIF. DURABLE POWER OF ATTORNEY ACT, 8A U.L.A. 310 (1993).

alternative is that they have none at all or ones that are no longer able to fulfill the role as guardian. The choice here could be characterized as guaranteed instability that comes with no concurrent guardian who has legal authority for a child versus the possible instability that comes from children having to adjust to successive guardians. Given two bad choices, between no concurrent guardian and too many, I still believe that having too many is better for a child than the instability of foster care, which is often the only other option for a child whose parent is not able to care for her.

Another concern raised about concurrent guardians is the potential for conflict between the guardian and the parent. Where a parent, however, believes that another adult should no longer be her child's guardian, the parent may simply revoke the guardianship and appoint a new guardian. And for all the reasons discussed here, the parent should have the power to revoke. Conflicts between the custodial parent and the guardian are problematic because both have legal authority, but in a contest between the two, the custodial parent's constitutional rights are superior.

The more difficult situation is where a guardian is in a struggle with a parent over the welfare of a child. This contest can involve both custodial and noncustodial parents. In a contest between the guardian and the custodial parent, the concurrent guardian may need to petition the court for a hearing on what is in the best interests of the child. In a situation in which the custodial parent has relinquished the care and control of the child to the concurrent guardian, a contest may also arise between a noncustodial uninvolved parent and the involved concurrent guardian. In these types of cases, a court will be the final arbiter of whose rights are paramount based on the child's best interests.

3. *Burden on the Court*

Finally, it is difficult to predict the burden that this proposal would put on the courts. One view is that greater certainty for single parents and their children from concurrent guardianship will reduce the burden on courts because they are less likely to intervene in order to arrange for care when the custodial parent can not care for her child. The other view, however, is that the courts will be forced to resolve disputes between the custodial parent and the concurrent guardian or noncustodial parent. However, vesting the custodial parent with the ultimate right to revoke the concurrent guardianship will reduce the potential for disputes.

To make concurrent guardianship accessible to as many single custodial parents as possible, the law should mandate that hospitals, childcare providers, and schools provide copies of the law and forms. This will provide parents who need to share guardianship with another adult an opportunity to learn the procedure for establishing a concurrent guardianship relationship. Moreover, hospitals, child care providers, and schools are the places where a parent is most likely to realize the need for another adult to be legally empowered to make decisions on behalf of the child.

The procedure for activating concurrent guardianship should be easy and should involve the courts as little as possible. While both testamentary, inter vivos, and standby guardianships have involved the courts, a model exists for transferring authority for children that does not involve the courts: the power of attorney. With a power of attorney, the principal activates the agent's authority as soon as the instrument is executed. The law does not require the principal to file the instrument with a court, nor does it require the agent to file an instrument accepting the authority. Yet, under the Uniform Durable Power of Attorney Act, a parent can transfer authority to make decisions for her child for up to six months.¹⁸³ This can be done repeatedly with no requirement that courts be notified.¹⁸⁴ More significantly, while powers of attorney have been used for actions that have legal repercussions, the law has never required powers of attorney to be recorded. While I recognize that the state has a more profound interest in the welfare of children than it does in most legal actions taken on behalf of a principal, I suggest that this interest is satisfied by formal requirements for the nominating instrument. If a state found this insufficient to satisfy its interest in the welfare of children, a concurrent guardianship statute could require the courts to establish a guardianship registry.

V. CONCLUSION

As is often the case, societal changes, including the increased numbers of single parents needing to share guardianship with other adults, have outpaced the law's ability to stay current. As controversial a proposal as concurrent guardianship may appear when initially examined, it logically extends existing scholarship and reforms in family law, specifically guardianship law.

Current family law scholarship acknowledges that the traditional family form is no longer the norm and that alternatives to exclusive parenthood are needed. The scholarship tends to either address the needs of nontraditional families by proposing new theories of family, or by proposing targeted exceptions to exclusive parenthood. Concurrent guardianship responds to these new theories of family and the targeted exceptions.

For example, Professor Fineman proposes that the law recognize the caretaking dyad as a unit as it has the traditional family. Her premise is that if the law adopts her meta-theory, micro-reform will be necessary and will follow. Concurrent guardianship is one way to meet the needs of the caretaking dyads to share caring for children. Professor Polikoff examines new theories for establishing parenthood for nonbiological parents, such as stepparents, or gay and lesbian life partners. Concurrent guardianship is a theory and a practical reform that would establish the legal authority of a stepparent or partner for a child. Finally, concurrent guardianship expands upon Professor Bartlett's and Professor Czapanskiy's proposals for psychological parenthood and individual caretaking contracts with grandparents. Perhaps concurrent guardianship's most notable difference is that it

184. *Id.*

recognizes that sometimes plans to share legal authority will be made in the context of inchoate relationships, in which the child has not yet spent so much time with the caretakers that there is an existing caretaking bond.

Concurrent guardianship not only expands existing scholarship, it also extends existing reforms. It responds to the practical needs of growing numbers of mothers raising children on their own or in relationships that the law traditionally refuses to recognize as family-like. Thus far, the scattered reforms establishing methods for parents to authorize other adults to have the legal decision-making power for children who are not their own, have been too few and, for the most part, too limited. Durable powers of attorney are temporally limited, terminate upon the delegating parent's death, and are of questionable value in most jurisdictions, particularly because schools will not accept powers of attorney in lieu of guardianships. Connecticut's coguardianship comes the closest to empowering parents to authorize others to make decisions on behalf of their children. This option, however, stops short of concurrent guardianship as proposed by this Article, because it requires the custodial parent to petition the court for approval of the coguardianship.

In contrast, concurrent guardianship empowers custodial parents to designate a concurrent guardian without involving the court. While the lack of judicial involvement in creating concurrent guardianship departs radically from traditional guardianship, it conforms to the general trend reflected in many of the Commissioner's proposed uniform laws to make the law more accessible and more carefully crafted to meet individuals' routine legal needs. Concurrent guardianship merely extends this trend to meet the needs of single parents, their children, and their caretakers.

Equity demands that the law respond to the needs of those living in diverse family forms. While the normative nuclear family may still be the ideal to many, it is the reality for relatively few. This Article urges state legislatures to accept the challenge to meet the needs of all of the families and children in their states. To do less is to deny as many as sixty percent of a state's citizens the security that comes from sharing guardianship of children with adults who choose to be actively involved in children's lives and to take responsibility for daily legal decision making. If states shrink from adopting concurrent guardianship because they perceive, however inaccurately, that it departs too far from traditional guardianship, they should at least enact the more limited means for parents to share legal decision-making for medical care and school enrollment. To do anything less is to perpetuate unnecessarily the insecurity faced daily by single parents, their children, and their caretakers.

