

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

IN RE D N DAILEY MINOR,

Supreme Court no. 165889
Court of Appeals no. 363164
Wayne County Circuit Court no.
2019-000790-NA

AMICUS CURIAE BRIEF OF THE
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

By: **JOSHUA M. PEASE (P75354)**
200 N. Washington Sq., Ste. 250
Lansing, MI 48913
(517) 334-1205

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF INTEREST OF AMICUS CURIAE vii

INTRODUCTION 1

ARGUMENT 3

 I. Federal laws and regulations do not require state courts to favor adoption
 over guardianship..... 3

 A. Federal law does not mandate a preference for adoption..... 3

 B. Federal law and guidance express a preference for family relationships
 8

 II. Research has dispelled the myth that adoption is “more permanent” than
 guardianship 9

 A. Guardianship is no less stable or beneficial than adoption..... 9

 B. Guardianship can avoid harmfully severing ties with parents and
 affords a desirable arrangement for kinship placements 12

 III. Policy is trending towards solutions that maintain parental rights 14

 IV. Guardianship helps preserve sibling relationships 17

 A. Federal law and guidance prioritize sibling relationships 18

 B. Best practices and research stress the importance of maintaining sibling
 relationships 19

CONCLUSION..... 25

WORD COUNT CERTIFICATION..... 26

TABLE OF AUTHORITIES

Statutes, Regulations, and Court Rules

42 USC § 671(a)(15) 5
 42 USC § 671(a)(16) 4
 42 USC § 671(a)(19) 4
 42 USC § 671(a)(29) 4
 42 USC § 671(a)(31) 18
 42 USC § 675(5)(E) 4-5
 Adoption and Safe Families Act of 1997,
 Pub L No 105-89, 111 Stat 2115 (1997) 3-5

 45 CFR § 1355.20(a)..... 6-7
 45 CFR § 1356.21(b)(2)(i)..... 5
 45 CFR § 1356.21(m)(1) 7

 AK St § 47.10.089(g) 16
 LA Child Code Ann art 1051 15
 ME St T 22 § 4059 16
 WA St 13.34.215 15

 MCR 7.212(B)..... 26
 MCR 7.312(A)..... 26
 MCR 7.312(H) 1, 26

Case Law

Moore v East Cleveland,
 431 US 494 (1977)..... 19
Robert v U.S. Jaycees,
 468 US 609 (1984)..... 19
Santosky v Kramer,
 455 US 745 (1982)..... 6
Troxel v Granville,
 530 US 57 (2000)..... 6

Duchesne v Sugarman
 566 F2d 817 (2nd Cir, 1977) 6

<i>Aristotle P v Johnson</i> , 721 F Supp 1002, (ND Ill 1989).....	19
<i>In re AKO</i> , 850 SE2d 891, (NC 2020).....	17
<i>In re Beck</i> , 488 Mich 6 (2010).....	15
<i>In re Dixson</i> , 981 NW2d 62 (Mich, 2022)	16
<i>In re ER/HR</i> , 306 A3d 221 (NH 2023)	17
<i>In re RDD-G</i> , 442 P3d 1100, (Or 2019)	17
<i>LMW v DJ</i> , 116 So3d 220, (Ala Civ App 2012)	17
<i>New Jersey Division of Child Protection and Permanency v DA</i> , 303 A3d 690 (NJ 2023)	17

Publications and Other Authorities

Scholarly Journals

Albert & Amy, <i>Adoption Cannot Be Reformed</i> , 12 Colum J Race & L 1 (2022).....	12
Bank et al, <i>Intervening to Improve Outcomes for Siblings in Foster Care: Conceptual, Substantive, and Methodological Dimensions of a Prevention Science Framework</i> , 39 Child & Youth Servs Rev 8 (2014)	23-24
Coupet, “ <i>Ain’t I A Parent?</i> ”: <i>The Exclusion of Kinship Caregivers From the Debate Over Expansions of Parenthood</i> , 34 NYU Rev L & Soc Change 595 (2010).....	9
Davidson-Arad & Klein, <i>Comparative Well Being of Israeli Youngsters in Residential Care with and Without Siblings</i> , 33 Child & Youth Servs Rev 2152 (2011)	21
Elias-Perciful, <i>Constitutional Rights of Children in Child Protection Cases</i> , Tex Lawyers for Children (2020)	6, 18
Faulkner et al, <i>Risk & Protective Factors for Discontinuity in Public Adoption and Guardianship: A review of the literature</i> , Quality Improvement Center for Adoption & Guardianship Support and Preservation (Jan 2017)	11, 14

Font & Kim, <i>Sibling Separation and Placement Instability for Children in Foster Care</i> , 27 Child Maltreatment 583 (Apr 2021)	23
Godsoe, <i>Permanency Puzzle</i> , 2013 Mich St L Rev 1113 (2013)	9
Goodwin & Madden, <i>Factors Associated With Adoption Breakdown Following Implementation of the Fostering Connections Act: A Systematic Review</i> , 119 Child & Youth Servs Rev 105584 (2020)	10
Gupta-Kagan, <i>The New Permanency</i> , 19 UC Davis J Juv L & Pol'y 1 (2015).....	10, 13-14
Hegar & Rosenthal, <i>Kinship Care and Sibling Placement: Child Behavior, Family Relationships, and School Outcomes</i> , 31 Child & Youth Servs Rev 670 (2009)	21, 23
James et al, <i>Maintaining Sibling Relationships for Children in Foster and Adoptive Placements</i> , 30 Child & Youth Servs Rev 90 (2008)	21
Kennedy, <i>A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings</i> , 72 Emory LJ 911 (2023)	5-6
Kothari et al, <i>A Longitudinal Analysis of School Discipline Events Among Youth in Foster Care</i> , 93 Child & Youth Servs Rev 117 (2018)	23
Lindner, <i>Adult Adoptee Access to Adoption and Birth Records: History, Controversy, Legislation, and Societal Change</i> , Adoption Advocate, Issue No 161 (Nov 2021).....	15
McCormick, <i>Siblings in Foster Care: An Overview of Research, Policy, and Practice</i> , 4 J Pub Child Welfare 198 (2010)	20-21, 23
McCormick, <i>The Role of the Sibling Relationship in Foster Care: A Comparison of Adults with a History of Childhood Out-of-Home Placement</i> (May 2009) (dissertation, St. Edward's University)	21-22
Mitchell, <i>The Family Dance: Ambiguous Loss, Meaning Making, and the Psychological Family in Foster Care</i> , 8 J Family Theory & Rev 361, 362 (2016)	13
Patten, <i>The Subordination of Subsidized Guardianship in Child Welfare Proceedings</i> , 29 NYU Rev L & Soc Change 237, 240-44 (2004).....	13
Richardson & Yates, <i>Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth</i> , 47 Child & Youth Servs Rev 378 (2014)	21, 23-24

Sankaran & Church, <i>The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights</i> , 61 Family Ct Rev 246 (2023)	11, 13
Sattler & Font, <i>Predictors of Adoption and Guardianship Dissolution: The Role of Race, Age, and Gender Among Children in Foster Care</i> , 26 Child Maltreatment 216 (2021).....	10
Sattler et al, <i>Age-Specific Risk Factors Associated with Placement Instability Among Foster Children</i> , 84 Child Abuse & Neglect 157 (2018)	22-23
Testa, <i>The Quality of Permanence – Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption</i> , 12 Va J Soc Pol’y & L 499 (2004).....	9-11
Timberlake & Hamlin, <i>The Sibling Group: A Neglected Dimension of Placement</i> , 61 Child Welfare 545 (1982).....	20-21
Trivedi, <i>The Harm of Child Removal</i> , 43 NYU Rev L & Soc Change 523, (2019).....	20
Wojciak et al, <i>Sibling Relationships of Youth in Foster Care: A Predictor of Resilience</i> , 84 Child & Youth Servs Rev 247 (2018)	21

Other Publications

American Bar Association, “ <i>Sibling Relationships Are Sacred</i> ”: <i>Benefits of Sibling of Placement and Contact</i> (May 2023)	19-24
Angel, <i>Foster Children’s Sense of Sibling Belonging: The Significance of Biological and Social Ties</i> , (Mar 28, 2014)	22
Brown et al, <i>Failed twice: Colorado foster kids who are adopted often end up back in the child welfare system</i> , Colorado Sun (Nov 14, 2022)	10
Caspi, <i>Sibling Development: Implications for Mental Health Practitioners</i> 322 (Springer Pub 2011).....	22
Child Welfare Information Gateway, <i>Sibling Issues in Foster Care and Adoption</i> , (2019).....	23
Children’s Bureau, <i>Discontinuity and Disruption in Adoptions & Guardianships</i> (Aug 2021)	9-10
Edwards, <i>Connecting with Siblings</i> , Judges’ Page Newsl Archive, Nat’l CASA Ass’n (2011).....	21
Geen, <i>Finding Permanent Homes for Foster Children: Issues Raised by Kinship Care</i> , Urban Inst (Apr. 2003)	14

How Are Child Protection Agencies Promoting and Supporting Joint Sibling Placements and Adoptions?,
Casey Family Programs (Aug 2020) 20

Kramer et al, *Siblings*,
in *APA Handbook of Contemporary Family Psychology* (2019) 22

Rolock & Fong, *Supporting Adoption and Guardianship: Evaluation of the National Quality Improvement Center for Adoption and Guardianship – Final Evaluation Report* (2019)..... 11-12

Separate Licensing Standards for Relative of Kinship Foster Family Homes,
88 FR 9411-01 (Feb 14, 2023)..... 7-8

Smith, *Siblings in Foster Care and Adoption: What We Know from Research*,
in *Siblings in Adoption and Foster Care: Traumatic Separations and Honored Connections* (Silverstein & Smith, eds, 2009)..... 22

US Dep’t of Health & Human Servs, Admin on Children, Youth & Families,
ACYF-CB-IM-21-01 (Jan 5, 2021) 8, 18

US Dep’t of Health & Human Servs, “HHS Secretary Becerra Announces Michigan as First State to Implement Kinship Care Rules” <https://www.hhs.gov/about/news/2024/03/28/hhs-secretary-becerra-announces-michigan-first-state-implement-kinship-care-rule.html> (posted March 28, 2024) 7

STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 1977, the National Association of Counsel for Children (“NACC”), is a 501(c)(3) non-profit child advocacy and professional membership association that advances children’s and parent’s rights by supporting a diverse, inclusive community of child welfare lawyers to provide zealous legal representation and by advocating for equitable, anti-racist solutions co-designed by people with lived experience. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC’s work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and an amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org

INTRODUCTION¹

This case has come before the Court on the question of whether trial courts must engage in a least restrictive means analysis at a termination of parental rights hearing and rule out all other permanency options before entering an order terminating rights. Specifically, it raises the question of whether guardianship is a preferred alternative to adoption, particularly when the child is in kinship placement. NACC takes no position on the proper interpretation of Michigan law but instead seeks to provide more in-depth information for the Court on relevant federal law and guidance, as well as current research and national best practices, regarding guardianships in the context of foster care proceedings.

Decades of research on the child welfare system have illuminated the key factors that better serve children's best interests. While safety, permanency, and well-being remain an important triad for this analysis, each of these concepts has been enriched by evidence and voices of lived experience experts. Cultural and familial identity, sibling bonds, and increasing (rather than reducing) a child's lifelong relationships are all now broadly recognized as influential and indispensable considerations to any best interests determination.

The trial court and the Court of Appeals decisions in this matter rested on a misperception that adoption offers greater "permanency, stability, and finality" to a child. Social scientists have examined these subjects extensively and debunked this assumption, refining the field's understanding in recent years and providing

¹ Pursuant to MCR 7.312(H)(5), no party or counsel for a party made any monetary contributions intended to fund the preparation or submission of this brief.

evidence-based conclusions about how best to achieve positive outcomes for children. Research demonstrates that the legal classification of a child’s ultimate permanency plan – e.g., adoption versus guardianship – is far less important than the relationships that underly the legal framework. Positive outcomes are more likely when children’s relational connections are preserved, rather than taken away. Federal law permits, and federal guidance encourages, state courts to pursue these legal arrangements for children in foster care.

ARGUMENT

I. **Federal laws and regulations do not require state courts to favor adoption over guardianship.**

Times have changed. Although adoption was once considered a preferential permanency option for children in foster care, child welfare researchers, scholars, leaders and lived experienced experts now agree that this is not universally true. Instead, permanency options such as guardianship have been increasingly endorsed, since they recognize a child's ongoing connections to their biological parents and other relatives. Federal law and guidance, empirical studies, other state courts, best practices, and academic scholarship have aligned to dispel the myth that adoption is necessarily and always more permanent or beneficial to a child.

A. *Federal law does not mandate a preference for adoption.*

The Adoption and Safe Families Act of 1997 ("ASFA"), a federal financing regulation governing the responsibilities of child welfare agencies, states in its very first line that it is designed to "promote the adoption of children in foster care." ASFA, Pub L No 105-89, 111 Stat 2115 (1997). Despite this, neither ASFA nor any other provision of federal law establishes a *mandatory* preference for adoption: neither for state child welfare agencies (who are the only parties subject to ASFA's mandates) nor for the state courts in which they practice.²

Instead, federal law reflects a preference for kinship placements but does so without favoring adoption over other placement options. For example, federal law

² Consistent with 10th Amendment anti-commandeering principles, AFSA does not and cannot compel state courts to comply with its requirements.

requires that state agencies “consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.” 42 USC § 671(a)(19). When a child is removed from parents, state agencies are also required to exercise due diligence to identify and provide notice to all grandparents, all parents of a sibling of the child when that parent has legal custody of the sibling, and other adult relatives of the child (including any other relatives suggested by the parents). 42 USC § 671(a)(29). The notice must explain that 1) the child has been or is being removed from the custody of their parents; 2) the options the relative has to participate in the care and placement of the child; and 3) the requirements to become a foster parent to the child. *Id.*

The importance of kinship placement is also reflected in federal law regarding termination of parental rights. ASFA imposes deadlines on state child welfare agencies for seeking termination of parental rights to prevent children languishing in foster care without meaningful or reasonable efforts to achieve legal permanency. To address this problem, ASFA expressly requires state agencies receiving Title IV-E funds to *file* a petition to terminate parental rights (TPR) in three circumstances, one of which is when the child has been in state foster care for 15 of the prior 22 months. 42 USC § 671(a)(16); 42 USC § 675(5)(E). Beyond filing of the petition under these certain conditions, ASFA requires nothing more: it does not require state courts to schedule hearings on those petitions, nor to rule on them in any prescribed manner. Indeed, it does not even require the agency to further litigate a TPR petition past the

point of filing. Furthermore, even this requirement for state agencies to file a termination petition does not apply if “the child is being cared for by a relative.” 42 USC § 675(5)(E)(i). Consequently, ASFA expressly recognizes that termination is unnecessary so long as the child is living with a relative.

Elsewhere, ASFA’s provisions address adoption and legal guardianship in equipoise. 42 USC § 675(5)(C) establishes minimum requirements for holding permanency hearings to evaluate permanency goals, including returning the child to their home, adoption, legal guardianship, or some other goal. The statute as written is not hierarchical and does not rank these goals in relation to another. Similarly, 42 USC § 671(a)(15)(F) permits state agencies to pursue alternate permanency goals concurrently with reunification efforts, specifically identifying “efforts to place a child for adoption or with a legal guardian,” without any indication that adoption is preferred. Regulations promulgated by the Department of Health and Human Services pursuant to ASFA are consistent with this theme. See, e.g., 45 CFR § 1356.21(b)(2)(i) (identifying, without preference, permanency goals of “reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement”).

Likewise, federal constitutional limitations disfavor a categorical preference for adoption over other placement options that avoid unnecessary termination of parental rights. As the United States Supreme Court has suggested—and multiple federal circuit courts have concluded—children and parents share a reciprocal right to family integrity. Kennedy, *A Child’s Constitutional Right to Family Integrity and*

Counsel in Dependency Proceedings, 72 Emory LJ 911, 921-32 (2023) (collecting and analyzing cases). Terminating parental rights inherently abrogates the parents' and the child's rights to family integrity. Consequently, a preference for adoption would create conflict between a state agency's placement goals and the fundamental right to family integrity as recognized in cases such as *Santosky v Kramer*, 455 US 745 (1982) and *Troxel v Granville*, 530 US 57 (2000). This right was eloquently described in *Duchesne v Sugarman*, 566 F2d 817 (2nd Cir, 1977): "This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the companionship, care, custody, and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent." *Id* at 825. Instead of relying on categorical preferences, federal constitutional law recognizes a suite of multiple rights held by the child that all favor a child welfare system that promotes child safety, kinship placements, and timeliness. Elias-Perciful, *Constitutional Rights of Children in Child Protection Cases*, Tex Lawyers for Children (2020) at 1-2.

Consistent with these principles, late last year, the U.S. Department of Health and Human Services' Administration for Children and Families (HHS) issued amended regulations that remove barriers for funding kinship placements. See 45 CFR § 1355.20(a). The most significant amendment is the addition of an allowance for licensing agencies to "establish one set of foster family home licensing or approval standards for all relative or kinship foster family homes that are different from the

set of standards used to license or approve all non-relative foster family homes.” *Id.* HHS further mandated that a foster care maintenance payment “made to a licensed or approved relative or kinship foster family home is the same as the amount that would have been made if the child was placed in a licensed or approved non-relative foster family home....” 45 CFR § 1356.21(m)(1). The establishment of different (presumably more relaxed) licensing standards for kinship placement while requiring identical maintenance payments is an intentional, system-level effort to incentivize and promote kinship placement. In March of this year, Michigan became the first state in the nation to implement these separate licensing standards for kinship placements. US Dep’t of Health & Human Servs, “HHS Secretary Becerra Announces Michigan as First State to Implement Kinship Care Rules” <https://www.hhs.gov/about/news/2024/03/28/hhs-secretary-becerra-announces-michigan-first-state-implement-kinship-care-rule.html> (posted March 28, 2024).

In its original proposal for the amended regulation, HHS explained its rationale, which “stems from the knowledge that it is generally best for children to be with family and also from the increasing shortage of qualified foster parents.” Separate Licensing Standards for Relative of Kinship Foster Family Homes, 88 FR 9411-01 (Feb 14, 2023). HHS acknowledged that current federal foster care regulations were developed “before research demonstrated that relative and kinship care is often the best option for children in foster care.” *Id.* at 9412. Summarizing that research, HHS noted that kinship placement helps to “preserve children’s cultural identity and relationship to their community”, leads to “fewer behavioral problems

and high placement stability rates”, and is “just as safe, or safer, when compared with children placed with unrelated foster families.” *Id* at 9414.

B. Federal guidance expresses a preference for family relationships.

In 2021, the federal Department of Health and Human Services’ Administration on Children, Youth and Families issued a memorandum describing best practices, resources, and recommendations for achieving permanency in a way that prioritizes the child’s well-being. US Dep’t of Health & Human Servs, Admin on Children, Youth & Families, ACYF-CB-IM-21-01 (Jan 5, 2021). Rather than promoting a preference for adoption, this guidance cautions against it by urging an evolved understanding about the harms associated with termination of parental rights: “Children in foster care should not have to choose between families. We should offer them the opportunity to expand family relationships, not sever or replace them.” *Id* at 10. In so doing, the agency noted that “[c]hildren do not need to have previous attachments severed in order to form new ones.” *Id* at 12 (citation omitted). The guidance to states emphasizes the “continued focus on the importance of preserving family connections for children as a fundamental child welfare practice.” *Id* at 2. “Children have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible.” *Id* Notably, the foregoing federal guidance has bipartisan support—it was issued by the Trump Administration and has been maintained by the Biden Administration.

In sum, federal law and guidance do not require state courts to favor adoption over legal guardianship. Instead, they promote kinship placements, without regard to whether those arrangements are legally defined as adoptions, guardianships,

custody, or something else. That preference is consistent with the social science, scholarship, and best practices concluding that kinship placements—and not a particular legal status—minimize harms and lead to better outcomes for children.

II. Research has dispelled the myth that adoption is more permanent than guardianship.

A. Guardianship is no less stable or beneficial than adoption.

Social science demonstrates that guardianships are as legally stable as adoptions. Testa, *The Quality of Permanence – Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 Va J Soc Pol’y & L 499 (2004); see also Coupet, “*Ain’t I A Parent?*”: *The Exclusion of Kinship Caregivers From the Debate Over Expansions of Parenthood*, 34 NYU Rev L & Soc Change 595, 610 (2010). One study concluded that, between adoption and guardianship placements, there are no significant differences “[w]ith respect to the permanency qualities of intent, belongingness, and continuity.” Testa at 528. Instead, factors such as “the degree of genealogical relatedness, sense of family duty, feelings of affection and length of acquaintance” are consequential for achieving stability and avoiding legal disruption. *Id* at 525. Indeed, one academic evaluated these research findings and warned against incorrectly conflating the important task of supporting a child’s sense of psychological and attachment permanence with the systems-driven responsibilities of placing children and exiting them from foster care. Godsoe, *Permanency Puzzle*, 2013 Mich St L Rev 1113, 1123 (2013).

Moreover, dissolutions occur in adoptions and guardianships at comparable rates. To illustrate, one study found a dissolution rate for adoptions of between 1-10%. Children’s Bureau, *Discontinuity and Disruption in Adoptions & Guardianships*

(Aug 2021) at 4 (citing Goodwin & Madden, *Factors Associated With Adoption Breakdown Following Implementation of the Fostering Connections Act: A Systematic Review*, 119 Child & Youth Servs Rev 105584 (2020)). Journalists in Colorado found that, from 2012 to 2022, nearly 13% of adoptions failed, and over 1,000 adopted children ended up returning to the foster care system. Brown et al, *Failed twice: Colorado foster kids who are adopted often end up back in the child welfare system*, Colorado Sun (Nov 14, 2022).

Another study found a dissolution rate for guardianships of 1-17%. Children's Bureau at 4 (citing Sattler & Font, *Predictors of Adoption and Guardianship Dissolution: The Role of Race, Age, and Gender Among Children in Foster Care*, 26 Child Maltreatment 216 (2021)). Guardianships often involve older children. The likelihood of exiting to guardianship increases with the age of the child or youth until approximately age thirteen. Testa at 530–31 (asserting that the adoption and guardianship stability rates are equal). And because older children's permanency arrangements are more likely to be disrupted, researchers have concluded that this difference accounts for any modest gaps in the dissolution rates between guardianship and adoptions.

Furthermore, “[t]he empirical record also shows no significant differences in well-being—measured by school performance and risky behaviors—between children who leave foster care to guardianship and to adoption. The differences that exist are between children who remain in foster care and those who leave to permanent families; the legal status of permanent families does not appear to affect child well-being.” Gupta-Kagan, *The New Permanency*, 19 UC Davis J Juv L & Pol’y 1, 15 (2015) (citation omitted). Instead, research has concluded that “the child’s well-being” is

determined by “the child’s and the caretakers’ sense of permanence, rather than the legal status of the placement.” Testa at 530. A review of 27 studies found similar risks to permanency in both adoptions and guardianships. Faulkner et al, *Risk & Protective Factors for Discontinuity in Public Adoption and Guardianship: A review of the literature*, Quality Improvement Center for Adoption & Guardianship Support and Preservation (Jan 2017). These factors included both pre-permanence and post-permanence child characteristics with little, if any, noted differentiation between adoption and guardianship. *Id* at 3.

Interestingly, research suggests that if achieving a timely permanency outcome is a priority, then it may be wise to *disfavor* adoption: “Nationally, the median time from removal to relative custody was 5.7 months. The median time from removal to guardianship was 17.4 months. Both of those legal dispositions take considerably less time to finalize than adoption, which has a median time from removal to discharge of 28.5 months.” Sankaran & Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 Family Ct Rev 246, 256-57 (2023). “[S]tates that prioritized guardianship not only reduced the time to permanency for children in foster care, they also saved considerable money due to the reduced numbers of days children spent in foster care.” *Id* at 260-61 (citation omitted).

The federal government has taken the problem of adoption disruption seriously, devoting more than \$20 million to a five-year project across eight jurisdictions “with the purpose to implement evidence-based interventions” to prevent post-permanency disruption and to “develop and test promising practices which, if proven effective, could be replicated or adapted in other child welfare

jurisdictions.” Rolock & Fong, *Supporting Adoption and Guardianship: Evaluation of the National Quality Improvement Center for Adoption and Guardianship – Final Evaluation Report* (2019) at 1-3. The federal government has also funded the National Center for Enhanced Post-Adoption Support to provide services and assistance to families that have achieved permanency through adoption or guardianship. <https://postadoptioncenter.org>. Similarly, the federal government has awarded grant funds to the National Center for Adoption Competent Mental Health Services with the goal of strengthening collaboration between child welfare and mental health services. <https://bridges4mentalhealth.org>. Each of these initiatives is driven by an acknowledgment that adoptions are not a “permanent” as they were previously perceived.

In sum, research makes clear that, if the goal is permanency for a child, then guardianship is no less valid or appropriate a goal than adoption. Courts, attorneys, and agencies should pursue permanency for children based on the individual facts and circumstances of each case, cognizant that adoption does not carry any inherent promise of stability.

B. Guardianship can avoid harmfully severing ties with parents and affords a desirable arrangement for kinship placements.

“Both legal and social science scholars have described the ways in which [guardianship or third-party custody] serve children at least as well as, if not better than, termination of parental rights and adoption.” Albert & Amy, *Adoption Cannot Be Reformed*, 12 Colum J Race & L 1, 4 (2022) (citation omitted). Just as federal guidance reflects the understanding that guardianship is beneficial because it maintains ties to the child’s parents as discussed above, scholars have similarly recognized the severe harm associated with severing a child’s connections to their

parent: “Terminating parental relationships can raise a ‘lifetime of questions for children about their identities as members of their families of origin and their degree to which they can ever become “real” members within a foster or adoptive family system.” Sankaran & Church at 258.

These concerns, reported anecdotally by adoptees, have borne out in research: “[s]tudies have shown that children whose parents’ rights have been terminated experience [something called] ambiguous loss,” which is a loss that involves a “lack of clarity about a loved one’s physical and/or psychological presence.” *Id* at 257-58 (citing Mitchell, *The Family Dance: Ambiguous Loss, Meaning Making, and the Psychological Family in Foster Care*, 8 J Family Theory & Rev 361, 362 (2016)). Unfortunately, “ambiguous loss can be the most distressful of losses because ‘it is unclear, there is no closure, and without meaning, there is no hope.’” *Id* at 257 (quoting Mitchell at 362).

This remains so even when parents are irrefutably unable to raise their child. “Research has concluded that children with strong, ongoing bonds with parents, especially older children, benefit from ongoing relationships with their parents; and that children can bond closely with their caretaker without severing their relationship with parents—strong bonds with multiple caregivers is not only possible, but healthy and normal.” Gupta-Kagan, *The New Permanency*, 19 UC Davis J Juv L & Pol’y 1, 15 (2015) (citing Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 NYU Rev L & Soc Change 237, 240-44 (2004)). Similarly, “[p]sychological and sociological research” has demonstrated “the importance of the biological parent-child relationship as a determinant of the child’s

personality, resilience and relationships with others, regardless of whether the child in fact lives with that parent....” Patten at 240.

Additionally, guardianships are frequently the preferred choice for individuals willing to care for a family member in foster care. Geen, *Finding Permanent Homes for Foster Children: Issues Raised by Kinship Care*, Urban Inst (Apr. 2003). This makes sense, as relative caregivers naturally still want to retain their natural role and title with the child (ex. “Grandma”) rather than supplant the role of the child’s parent. Placements that are more favorable for kin lead to better outcomes and are therefore in the child’s best interest because “[c]hildren in kinship care are more likely to feel that they belong with the family they live with than children in non-kinship care.” Gupta-Kagan at 23 (citation omitted).

Unsurprisingly, then, kinship placements tend to be more stable than other placements. *Id* at 17. In fact, a comprehensive, federally-supported literature review found that placement with grandparents and placements with caretakers who have a close biological connection to the child are both factors that prevent against instability. See Faulkner at 5, 13, 15, 26.

III. Policy is trending towards solutions that maintain parental rights.

While termination of parental rights ends the *legal* relationship between parent and child, it does not necessarily end the *familial* relationship that exists. It is not unusual for children to maintain contact with their parents after termination. The love, bond, and relationship continue to exist long after courts sever the legal ties. Thus, for many families, termination is a legal fiction that leaves the relationship in place without the protections generally afforded by law (such as inheritance, next-of-kin status in hospital settings, etc.). In addition, some courts

have found that termination of parental rights does not terminate parental obligations, thus maintaining some degree of legal attachment. See, e.g., *In re Beck*, 488 Mich 6 (2010) (a child support obligation in place prior to termination of parental rights remains modifiable and enforceable after termination).

Individuals and groups, such as the National Council for Adoption and the Adoptee Rights Coalition, have worked for reforms regarding adoptions. Adoptees have pushed for access to their own adoption records both out of necessity (e.g., needing medical history) and out of a desire to reconnect with their birth families. Lindner, *Adult Adoptee Access to Adoption and Birth Records: History, Controversy, Legislation, and Societal Change*, Adoption Advocate, Issue No 161 (Nov 2021) (published by National Council for Adoption). The spread of social media has also made it more likely that adoptees and children who aged out of the foster care system will track down their birth families and attempt to reestablish those familial relationships. “Closed” adoptions are all but illusory given the changing landscape of technology and social media.

Because of these realities, more than 20 states have enacted statutes creating avenues for reinstatement of parental rights. Some states establish a minimum age after which reinstatement may be considered. For example, the minimum age in Louisiana is 15 years old. LA Child Code Ann art 1051. On other hand, the minimum age in Washington is 12 years old, and younger children may petition for reinstatement by showing good cause. WA St 13.34.215. Washington is also among the states which only allow the child to petition for reinstatement. *Id.* Others, like

Maine, only allow the Department of Health and Human Services or equivalent agency to petition. ME St T 22 § 4059. Conversely, in Alaska, only a parent who has voluntarily relinquished parental rights may petition for reinstatement. AK St § 47.10.089(g). Despite the varied procedures of these statutes, the common thread is a recognition that adoption has not worked for many. So many, in fact, that state legislatures are increasingly motivated to create practicable statutory solutions to restore these legal relationships. Such fixes are unnecessary for legal guardianship, which inherently preserves the legal parent-child relationship and has innate flexibility to allow for future modification due to changed circumstances.

Courts have also taken notice of deep flaws in the child welfare system and urged legislative reform. For example, then-Chief Justice McCormack of this Court issued a powerful dissent in *In re Dixon*, 981 NW2d 62 (Mich, 2022), lamenting that Michigan’s statutory framework “forces on courts a binary choice: full custody or full termination.” *Id* at 67. She noted with approval the flexibility of limited guardianships for maintaining familial relationships *Id*. “The termination-of-parental-rights framework creates an illusion that there are only two options: terminate and give the child permanence, or don't terminate and keep the child in limbo while the case remains pending.” *Id* at 68.

Reflecting the lack of any federal mandate favoring adoption, sister state courts have reversed terminations of parental rights where alternatives, such as a guardianship or a custody order, were available that would give the child stability while also preserving the parent-child relationship. In addition to the cases cited in

Respondent-Appellant's Supplemental Brief, several other states have provided persuasive authority. For example:

- *LMW v DJ*, 116 So3d 220, 225-26 (Ala Civ App 2012) (holding that, given the child's and parent's wishes to maintain a relationship, termination of parental rights was not in the child's best interest despite the grandparent's preference for adoption);
- *In re AKO*, 850 SE2d 891, 896-97 (NC 2020) (reversing termination of parental rights because fifteen-year-old child had a strong bond with her parents and did not consent to adoption, and termination was unnecessary for legal guardianship);
- *In re RDD-G*, 442 P3d 1100, 1113 (Or 2019) (reversing termination of parental rights and concluding that legal guardianship would preserve the child's relationship with her birth mother and extended family);
- *New Jersey Division of Child Protection and Permanency v DA*, 303 A3d 690 (NJ 2023) (reversing termination because not all alternatives, such as kinship placement without mother's consent, had been ruled out);
- *In re ER/HR*, 306 A3d 221 (NH 2023) (trial court did not err by awarding guardianship rather than terminating parental rights).

IV. Guardianship helps preserve sibling relationships.

While the record in this case does not reflect sibling relationships at stake, any opinion from this Court will invariably affect families in which there are siblings in different placements. As such, it is important to understand how sibling relationships are part and parcel of kinship placement and how maintaining those relationships

leads to better, healthier outcomes for the children. The benefits of maintaining sibling relationships are clear and documented by research studies, federal law, and best practice guidance. “Psychologists and other child welfare professionals recognize the importance of a foster child’s need to have regular access to the child’s other siblings,” which is “ideally achieved by placing the siblings together.” Elias-Perciful at 19.

A. Federal law and guidance prioritize sibling relationships.

Federal law requires state agencies to make reasonable efforts to place siblings removed from their home in the same foster care, adoption, or guardianship placement or, if that is not possible, facilitate visits or ongoing contacts for siblings that, unless it is contrary to the safety or wellbeing of any of the siblings to do so. 42 USC § 671(a)(31). HHS guidance further emphasizes the importance of keeping siblings together and urges a focus on relational permanence as opposed to only legal permanence. ACYF-CB-IM-21-01 at 3, 12. The agency emphasized that “[p]lacing siblings together is a critical aspect of securing permanency for children and must be prioritized.” *Id.* at 9. It noted that there are “lifelong implications of separating siblings” and “[p]ermanency plans that result in severing sibling attachments do not support the lifelong connections and relationships associated with permanency and well-being for children and youth. It is a grievous consequence of foster care that we must prevent at all cost.” *Id.* at 9–10. That is because “kinship placement, early stability, and intact sibling placement are predictors of permanency achievement.” *Id.* at 11. Adoption, though, can sever that legal relationship between siblings if they are not adopted together, and it precludes the possibility of a legal relationship with biological siblings who are born later.

One federal district court concluded, based on United States Supreme Court precedent, that children in foster care have a constitutional right to maintain their sibling relationships through reasonable contact. *Aristotle P v Johnson*, 721 F Supp 1002, 1004–05, 1007 (ND Ill 1989). Specifically, the court rooted the right in the First Amendment’s freedom of association, relying on *Robert v U.S. Jaycees*, 468 US 609 (1984), in which the Supreme Court identified “[t]he relationship between two family members” as the “paradigm of such intimate human relationships” protected against undue government intrusion. *Aristotle P* at 1004–05. The district court also concluded that the right to maintain sibling relationships was a substantive due process right protected by the Fourteenth Amendment, relying on *Moore v East Cleveland*, 431 US 494 (1977), where the Supreme Court recognized that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation’s history and tradition.” *Aristotle P* at 1007.

B. Best practices and research stress the importance of maintaining sibling relationships.

According to the American Bar Association’s Children’s Rights Litigation Committee, “the failure to maintain sibling relationships in foster care harms children’s ability to form their identities, deprives them of a vital source of support as they grow and develop, and causes lifelong grief and yearning.” American Bar Association, “*Sibling Relationships Are Sacred*”: *Benefits of Sibling of Placement and Contact* (May 2023) (“ABA”) at 2. On the other hand, “[m]aintenance of sibling bonds...helps improve each child’s mental health, reinforces feelings of stability, shapes identity, and ameliorates educational and adult life competence.” *Id.*

Children’s best interests typically are served by keeping sibling groups unified, even after removal from their parents. “Being placed with siblings can serve as a protective factor against the adverse experiences associated with placement in foster care, provide continuity and connection to family, and help to expedite the management and delivery of services.” *How Are Child Protection Agencies Promoting and Supporting Joint Sibling Placements and Adoptions?*, Casey Family Programs (Aug 2020) at 1 (citations omitted).

Many studies point toward this consensus view. Collectively, they show that maintaining sibling relationships: (1) mitigates the trauma that results from family separation; (2) is beneficial to the child’s mental health; (3) promotes identity formation and stability; (4) reduces placement disruptions; (5) provides a unique source of support and help for the child; (6) increases educational competency; and (7) improves adulthood social skills.

- **Mitigates Trauma:** Placing sibling groups together mitigates the trauma of family separation. ABA at 7-11 (citing to Trivedi, *The Harm of Child Removal*, 43 NYU Rev L & Soc Change 523, 533, 573–74 (2019); McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J Pub Child Welfare 198 (2010) (“McCormick I”) (evaluating the intensified pain, grief, and trauma associated with being separated from siblings); Timberlake & Hamlin, *The Sibling Group: A Neglected Dimension of Placement*, 61 Child Welfare 545, 549 (1982) (“Given the reciprocal nature of sibling role relationships, [separated siblings] often feel that they have lost a part of themselves, compounding separation and loss issues associated with foster care. Not only

are foster children engaged in the grief process over their absent parents and siblings, they are also denied access to a natural support group within which to resolve their grief.”); Edwards, *Connecting with Siblings*, Judges’ Page Newsl Archive, Nat’l CASA Ass’n (2011)). Specifically, siblings play a critical role in repairing and minimizing the psychological damage that results from removal, such as instability, separation, and trauma. ABA at 11 (citing McCormick I; James et al, *Maintaining Sibling Relationships for Children in Foster and Adoptive Placements*, 30 Child & Youth Servs Rev 90 (2008)).

- **Improves Mental Health:** Placing siblings together reduces depression and self-blame. ABA at 16-17 (citing Hegar & Rosenthal, *Kinship Care and Sibling Placement: Child Behavior, Family Relationships, and School Outcomes*, 31 Child & Youth Servs Rev 670 (2009); Davidson-Arad & Klein, *Comparative Well Being of Israeli Youngsters in Residential Care with and Without Siblings*, 33 Child & Youth Servs Rev 2152 (2011); Wojciak et al, *Sibling Relationships of Youth in Foster Care: A Predictor of Resilience*, 84 Child & Youth Servs Rev 247 (2018)). It is also associated with fewer symptoms of anxiety and depression. ABA at 16-17 (citing Richardson & Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child & Youth Servs Rev 378 (2014); McCormick, *The Role of the Sibling Relationship in Foster Care: A Comparison of Adults with a History of Childhood Out-of-Home Placement* (May 2009) (dissertation, St. Edward’s University) (“McCormick II”). Conversely, separating siblings is damaging to children’s

mental health. ABA at 8 (citing Smith, *Siblings in Foster Care and Adoption: What We Know from Research*, in *Siblings in Adoption and Foster Care: Traumatic Separations and Honored Connections* (Silverstein & Smith, eds, 2009)). As adults, children who had been separated from their siblings have lower levels of social support, self-esteem, and income. ABA at 8 (see McCormick II).

- **Promotes Stability:** Placing siblings together promotes resilient families and developmental benefits for the children. ABA at 9-10 (citing Kramer et al, *Siblings*, in *APA Handbook of Contemporary Family Psychology* (2019) (“[F]or adolescents in foster care, sibling relationship qualities, such as support, positively predicted aspects of self-concept including acceptance, self-efficacy, psychological maturity, and activity, with the amount of contact with siblings magnifying the strength of these associations.” (citation omitted)); Smith; Caspi, *Sibling Development: Implications for Mental Health Practitioners* 322 (Springer Pub 2011) (reviewing academic literature and concluding that best practices call for placing siblings together and promoting sibling contact when they cannot be placed together). On the other hand, separating siblings poses troubling challenges to children’s identity-formation and sense of stability and belonging. ABA at 9 (citing Angel, *Foster Children’s Sense of Sibling Belonging: The Significance of Biological and Social Ties*, (Mar 28, 2014)).
- **Decreases Disruptions:** Placing siblings together decreases the likelihood of placement disruptions. ABA at 14 (citing Sattler et al, *Age-Specific Risk*

Factors Associated with Placement Instability Among Foster Children, 84 Child Abuse & Neglect 157 (2018); Font & Kim, *Sibling Separation and Placement Instability for Children in Foster Care*, 27 Child Maltreatment 583 (Apr 2021)).

- **Provides Unique Support:** Siblings in foster care may also look to each other as a unique source of support and help because they can “provide a significant source of continuity throughout a child’s lifetime and can be the longest relationships that most people experience.” Child Welfare Information Gateway, *Sibling Issues in Foster Care and Adoption*, at 2 (2019). Sibling relationships can be of even greater significance when facing abuse, neglect, and separation from parents. ABA at 15-16 (citing McCormick I).
- **Increases Educational Competence:** Placing siblings together improves a child’s educational competence. ABA at 17-18 (citing Richardson & Yates). School performance by children in a placement with all of their siblings outperform children placed alone or with only some of their siblings. ABA at 18-19 (citing Hegar & Rosenthal). Placement with siblings also reduces behavioral issues in the classroom. ABA at 18 (citing Kothari et al, *A Longitudinal Analysis of School Discipline Events Among Youth in Foster Care*, 93 Child & Youth Servs Rev 117 (2018)).
- **Improves Adulthood Skills:** Placing siblings together improves adulthood social skills, such as negotiation and conflict resolution. ABA at 19 (citing Bank et al, *Intervening to Improve Outcomes for Siblings in Foster Care: Conceptual, Substantive, and Methodological Dimensions of a Prevention Science*

Framework, 39 Child & Youth Servs Rev 8 (2014)). It also improves occupational competency, housing competency, and relationship competency, while increasing civic engagement. ABA at 19 (citing Richardson & Yates).

When considering a child's best interest, it is vital for the courts to appreciate and give proper weight to the long-term benefits associated with maintaining sibling relationships, which are better protected by kinship guardianship arrangements than adoption.

CONCLUSION

Research, federal law and guidance, case law from sister states, and developments in Michigan all support maintaining familial relationships rather than severing them. Without taking a position on the proper outcome in this particular case, NACC respectfully requests that this Honorable Court find that guardianship is no less permanent than adoption, carries benefits such as a relational permanency that adoption does not, and should not be disfavored by trial courts when considering permanency for children in foster care.

Respectfully submitted,

Joshua Pease

Joshua M. Pease (P75354)
200 S. Washington Sq., Ste. 250
Lansing, MI 48913
On behalf of the National Association
of Counsel for Children

WORD COUNT CERTIFICATION

I certify that, pursuant to MCRs 7.212(B)(1), 7.312(A), and 7.312(H)(3), this brief contains 5,934 countable words.