

THE PROMISE OF PERMANENCY

A Report from the Permanency Options Workgroup of the Model Courts Project

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Introduction.

One day Charlie Brown was in his backyard having target practice with his bow and arrow. He would pull the bow string back and let the arrow fly through the air and into a fence on the other side of the yard. Then, he would go to where the arrow had landed and draw a target around it, always with the arrow in the center of the bull's-eye. Several arrows and targets later, Lucy ran out into the yard and said, "Charlie, you don't do target practice that way. You draw the target, and then you shoot the arrow." Charlie's telling response was, "I know that, but if you do it my way, you never miss!"

It seems that sometimes we determine the permanency plan for a foster child very much like Charlie hit the bull's-eye. We select the permanency plan based on what is convenient, on what is most readily available, or on other factors that essentially cast the child upon a course as uncertain and random as Charlie's arrow. We then try to justify that plan as the best plan for the child, the bull's-eye, if you will. The Model Courts Project, through the Permanency Options Workgroup (hereinafter referred to as the "Workgroup"), has undertaken to review permanency options for children in foster care and to make recommendations as to how the appropriate permanency option for each child can be selected in a manner that will ensure that due consideration has been given to each option, and that the decision that is ultimately made is truly in the best interest of each individual child. This paper presents the results of that review and offers specific recommendations as to how permanency decisions could be made to provide positive outcomes for children. The Workgroup believes that positive outcomes for more children can be achieved if we develop a presumptive order of preference for permanency options, so that the permanency plan for each individual child can be determined by systematically considering the various permanency options to find the one option that is the most appropriate for that particular child.

The call to arms.

Many things go into developing and operating an effective permanency planning program in a community. Good procedures and process are essential, but perhaps the real key to effective permanency planning is developing a certain attitude or, a mind-set. This mindset should be based on the basic principles that reflect the spirit, as well as the letter, of the Adoption and Safe

Families Act of 1997 (“ASFA”). We need discipline to approach each case with that mind-set. That is what we hope to develop through this report. Before starting, there are a couple of preliminary points we want to make, one primarily for the benefit of the judges, and the other for the benefit of all of the other players in the permanency planning process.

The measure of success of the permanency planning process in any given community will necessarily be a factor of the judge’s understanding of, and commitment to, the process. The following quotes, taken from a National Council of Juvenile and Family Court Judges guidebook, emphasize the importance of the judge taking a leadership role in the development and operation of a system finely tuned to the timely achievement of permanency for our children in care:

“Judicial commitment and leadership is the key factor in any effort to improve systems response to child health and safety needs, and to provide stable and permanent homes for children. A judge sets the tone for the entire system by expressing a commitment to timely permanency, setting clear expectations of all parties, and demonstrating congruent behaviors from the bench. *Through persistent pursuit of good practice and by initiating improvement efforts, a judge can create a culture of excellence that involves court staff and other system participants.*”

“Judges who embark on a path of excellence in handling of child abuse and neglect cases recognize the importance of addressing case oversight through effective and timely case scheduling, of thorough hearings with informed and prepared participation by all parties, and of regular review hearings. *A self-disciplined court can discipline the whole system.*”¹

The second point, with more universal application among all of the participants in the process, is that there is no crystal ball. We must make our judgments based on information available to us at the time the decision needs to be made, and not allow our children to teeter on the edge between permanency options. This point is reflected in the following quotes from the same National Council of Juvenile and Family Court Judges guidebook:

“Many children have lingered in foster care because a judge or social services worker wanted guarantees of permanent safety, health and well-being of a child into the future. This resulted in raising the standard for birth parents from minimally acceptable parenting behavior to ‘good parenting behavior’ for the return of the child. It also resulted in decisions not to terminate parental rights of

¹ “Judge’s Guidebook on Adoption and Other Permanent Homes for Children”, Technical Assistance Bulletin, Volume III, No. 1, February 1999 Volume III, No. 1, February 1999, Permanency Planning for Children Department, National Council of Juvenile and Family Court Judges.

a child until an adoptive family was fully in place. Both of these approaches have harmed children by keeping them in temporary care longer than necessary.”

“It must be understood that the best interests of a child are to find a safe, nurturing and permanent home for the child as soon as possible. Even with the heroic efforts of social workers and judges, it is not possible to predict the future with 100% accuracy. Temporary placement of children is damaging, although health and safety concerns often require it. A decision not to ‘decide’ is in reality a potentially damaging decision with long term implications for the child. Judicial officers must be leaders in ensuring that the safeguards provided for in the child protection process allow for the best decisions to be made **within the realm of existing knowledge**, and acknowledge that making decisions in these cases is not for the faint of heart.”²

Ours is a society of quid pro quo, which means simply something for something. As used in the law, it means the giving of one valuable thing for another. Even the state is not allowed to take anything from us without fair consideration. If the state needs our land for a highway, as an example, it must pay us a fair value for our land and, if we disagree with that value, then we have the right to take what they have paid into the court and litigate for that to which we believe we are entitled. We are not a society that permits anyone, but particularly the state, to take from us without just compensation. When we remove children from their homes, whether in an emergency situation, or after persistent, but unsuccessful, intervention, we take something from them more basic and far more valuable than mere property. We take away their security and comfort of being in their own homes, with their own families, however dysfunctional their families may be. It can never be fully restored. Children are damaged by their removal from their home and family, and they continue to be damaged, even under the best of circumstances, until they are returned to their homes or until they are stabilized in another “permanent” home. When we remove children from their homes through state action, there is an implied promise, a covenant if you will, to effect permanency for them timely and compassionately, and with as little damage to them and to their family as possible. Whether permanency for that child comes in the form of reunification with the birth family or in some other permanent living arrangement depends on the facts of each individual case. But permanency must be achieved and it must be achieved expediently to minimize the harm to the child and to make right the wrong that has been done to the child.

What is “permanency”?

What is “permanency” within the context of this report? Black’s law dictionary defines permanent as, “Continuing or enduring in the same state, status, place or the like, without

² “Judge’s Guidebook on Adoption and Other Permanent Homes for Children”, Technical Assistance Bulletin, Volume III, No. 1, February 1999 Volume III, No. 1, February 1999, Permanency Planning for Children Department, National Council of Juvenile and Family Court Judges.

fundamental or marked change; not subject to fluctuation, or alteration; fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient; generally opposed in law to 'temporary,' but not always 'perpetual.'" As we move through this report, particularly as we discuss characteristics of a permanent placement, we will see the relevancy of that definition.

The Program Guidelines for the Judicial Citizen's Review Program of the Georgia Council of Juvenile Court Judges of Georgia define a permanent home as, "one that is committed to a sense of continuity for the child." One judge put it, "Permanency is where you go for Thanksgiving," the idea being that we need to create for these children an environment that, when a child is thirty-three instead of thirteen, then, for the family-focused holidays, he or she will come home to the family in which we placed them. Addressing permanency on a more personal level, permanency for the children that we serve is that sense of belonging and security we work for and covet for our own children. That definition should be the standard for all people involved in the system.

What are the permanency options?

We all know that, under both state and federal law, reunification is the first permanency option, except in those situations where there is a presumption that reunification is not in the child's best interest, as provided for in O.C.G.A. Sections 15-11-58(a)(4) and (h).³ It is important

³ O.C.G.A. § 15-11-58(a)(4) provides that reasonable efforts are not required in the following circumstances:

(A) The parent has subjected the child to aggravated circumstances which may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse;

(B) The parent has:

- (i) Committed murder of another child of the parent;
- (ii) Been convicted of the murder of the other parent of the child;
- (iii) Committed voluntary manslaughter of another child of the parent;
- (iv) Aided or abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of another child of the parent; or

that the facts of each case be examined *before* reunification efforts are initiated, because valuable time and resources can otherwise be wasted when reunification efforts are initiated regardless of whether they are warranted or in the best interests of the child. In those cases where reunification is either not appropriate or not reasonably achievable within time frames that are consistent with the developmental needs of the child, then what are the other permanency options? There are four permanency options enumerated under Georgia law, as follows:

1. Adoption- Termination of parental rights, followed by adoption is specifically a permanency option under Georgia law.

(v) Committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

(C) The parental rights of the parent to a sibling have been terminated involuntarily ...

Furthermore, O.C.G.A. § 15-11-58(h), regarding petitions for non-reunification, creates a presumption that reunification services should not be provided if a court determines by clear and convincing evidence that: (1) The parent has unjustifiably failed to comply with a previously ordered plan designed to reunite the family; (2) A child has been removed from the home on at least two previous occasions and reunification services were made available on those occasions; (3) Any of the grounds for terminating parental rights exist, as set forth in O.C.G.A. 15-11-94(b); or (4) Any of the circumstances identified in O.C.G.A. § 15-11-58(a)(4) exist, making it unnecessary to provide reasonable efforts to reunify.

2. Legal Guardianship- The first mention of “legal guardian” is in O.C.G.A. Section 15-11-58(a)(6), wherein it is provided that, “Reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts” at reunification. But, legal guardianship is defined under ASFA as, “a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making. The term ‘legal guardian’ means the caretaker in such a relationship.” Under Georgia law “[t]he power of the guardian over the person of his ward shall be the same as that of a parent over a child; the guardian standing in the place of the parent.”⁴ Accordingly, under Georgia law a guardianship fits the definition of a guardian under ASFA.
- 3 Relative Custody- If, after a judicial hearing in which the court finds that reunification efforts would be detrimental to the welfare of a child, and custody is granted to a relative, then the order shall remain in effect until the child’s eighteenth birthday, subject to the court’s review every three years and unless modified following a petition for modification by a party pursuant to O.C.G.A. Section 15-11-40. O.C.G.A. Section 15-11-58(i). Whether, due to the two conditions just mentioned, this is really a permanent placement as contemplated by ASFA is certainly subject to debate, but it has been approved as an appropriate permanency option by the federal authorities, at least as applied to relatives. This permanency option, since the enactment of Senate Bill 236 in 2003, has been referred to by the Workgroup as “extended temporary custody.” Does custody with a relative or any other person under “rolling” two-year orders constitute a permanent placement? The Workgroup believes that it does not.
- 4 Another planned permanent living arrangement- O.C.G.A. Section 15-11-58(o)(2) lists “another planned permanent living arrangement” among permissible permanency options. What is another planned permanent living arrangement? Since the code says “another,” then it must mean that the living arrangements should have the same characteristics as the other permanency options. Senate Bill 236 enumerated several permanency options that fall under the category of another planned permanent living arrangement. Just as with relatives, under prior and current law, if, after a judicial hearing in which the court finds that reunification would be detrimental to the welfare of the child, and custody is awarded to a qualified caregiver, then the order shall remain in effect until the child’s eighteenth birthday unless modified following a petition for modification by a party. O.C.G.A. Section 15-11-58(i)(1). As used in this report, the term “qualified caregiver” refers to those persons and entities enumerated in O.C.G.A. Section 15-11-58(i) as being eligible to receive custody of a child until the child’s eighteenth birthday, subject to periodic reviews and subject to a change of custody pursuant to O.C.G.A. Section 15-11-40. Whether, due to the two conditions just

⁴ O.C.G.A. § 29-2-1 (effective until July 1, 2005). *See also* O.C.G.A. § 29-2-21(a) from Act 460 passed during the 2004 Session of the General Assembly, to become effective July 1, 2005.

mentioned, this is really a permanent placement as contemplated by ASFA is certainly subject to debate, and this issue has not been addressed by the federal authorities as it has been with relatives. Because of the importance of understanding what constitutes another planned permanent living arrangement, and because of the significant changes made to O.C.G.A. Section 15-11-58(i) by Senate Bill 236, a separate section is included subsequently in this report discussing this permanency option. **[Note: Need to make it clear that the new SB 236 options fit here, because they do not fit anywhere else. Any suggested language will be greatly appreciated.]**

According to DFCS Regulations, there are two other forms of permanency: long term foster care by agreement and emancipation. But are these options really planned permanent living arrangements, or are they otherwise considered to be appropriate permanency options for children? The Workgroup, fully realizing that a lot of children wind up in long term foster care, and acknowledging that it sometimes seems that there is no other option for some children, do not believe that long-term foster care by agreement and emancipation satisfy the federal or state legal definitions of permanency. That position is supported by others as discussed in the subsequent section on another planned permanent living arrangement. However, as noted in the subsequent discussion, long-term foster care, if embodied with specific characteristics and approved by the court, can be an appropriate alternative permanency option for children.

Guardianships under Georgia law as a permanency option.

In addition to reunification with the birth parent and termination of parental rights and adoption, the Adoption and Safe Families Act of 1997 (ASFA) specifically contemplates “legal guardianship” as a permanency option. Section 475(5)(C) of the Act (42 U.S.C. 675) defines the term “legal guardianship” as “a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making. The term ‘legal guardian’ means the caretaker in such a relationship.” The Final Rule further clarifies that this definition makes no distinction between physical and legal custody and is “intended to include all legal guardianship arrangements that are permanent.” Thus, the key to whether any proposed disposition is an appropriate consideration for a child in foster care is in the working definition and application of the concept of “permanency.”

Georgia’s implementing legislation likewise includes legal guardianship among the permissible post-TPR dispositions. Amendments to Georgia’s Juvenile Code effected by the passage of Senate Bill 236 in the 2003 legislative session created the option for the court to “commit the child to a suitable individual on the condition that the person becomes the guardian of the child pursuant to the court’s authority under Code Section 15-11-30.1” after ruling out placement with a relative and placement for purposes of adoption. O.C.G.A. Section 15-11-103(a)(3) (2003).

Case law makes clear that a permanent guardianship cannot exist unless a child has no living legal guardian. That is, a guardian cannot be appointed unless the child is in need of a guardian because the child's natural guardian (i.e., a parent) is deceased, has voluntarily surrendered parental rights, or a court of competent jurisdiction had previously ascertained the parent's loss of the right to guardianship over the child. *Whitlock v. Barrett*, 158 Ga. App. 100, 102 (1981). Thus, guardianships created under factual circumstances such as when the child's birth parents have died, voluntarily relinquished their parental rights, or had their parental rights terminated by the court, are considered "permanent" guardianships, as opposed to a "temporary guardianship" because there would be no individual with parental right to consent to the appointment of a temporary guardian under these circumstances. The Workgroup agrees that guardianships fashioned this way (i.e., "permanent guardianships") are appropriate permanency options under both federal and state law because they embody the requisite features of permanent placement.

Because the custodial arrangements created in these situations are intended to be permanent and self-sustaining and effectuate the transfer of parental rights, this state law construction of a guardianship fits squarely within ASFA's definitional characteristics of a "legal guardianship." As such, permanent guardianships in Georgia are appropriate permanency options in post-TPR situations under both federal and state law.

The discussion of the appropriateness of guardianships as a permanency option does not end with "permanent guardianships," however. The Juvenile Court's broad authority to grant guardianships pursuant to O.C.G.A. Section 15-11-30.1 encompasses the power to create both permanent and temporary guardianships. That statute grants the juvenile court "jurisdiction to appoint a guardian of the person or property of any child and with jurisdiction over proceedings involving any child whose custody is the subject of controversy." O.C.G.A. Section 15-11-30.1(a). Because "permanent guardianships" have been addressed, the discussion now turns to the appropriateness of "temporary guardianships" as permanency options.

A temporary guardian of a child can be appointed, for instance, when a parent consents to have a third party care for the child while the parent rehabilitates. Formalizing this arrangement through a temporary guardianship allows the caretaker guardian to stand in *loco parentis* to the child, with the duty to provide for the child's welfare. A parent who previously consented to the temporary guardianship may petition the court to terminate the temporary guardianship. If the temporary guardian objects, however, the court must hold a hearing to determine if the requested termination of the temporary guardianship would be in the child's best interest.

Although ASFA does not specifically address the nature of temporary guardianships, the Act's definition of a "legal guardianship" references relationship traits such as permanency and the ability to be self-sustaining. Providing further guidance, the Adoption 2002 Report characterizes permanent placements as those that evidence the following qualities:

1. Legally intended to be permanent – both to last throughout the child’s minority and to establish family relationships that will last for a child’s lifetime;
2. Legally secure from modification;
3. The permanent caregiver has the same legal responsibility for the child as the birth parent;
4. The state no longer has legal custody of the child and the permanent caregiver is not subject to continuing state supervision.⁵

Analysis of temporary guardianships through application of these guidelines supports the Workgroup’s conclusion that temporary guardianships are not an appropriate permanency option under state and federal law. Rather, temporary guardianships are actually diversions from the deprivation jurisdiction of the juvenile court, and those cases are more properly treated as a dismissal of the deprivation action and the entry of a guardianship. The jurisdiction in such cases is guardianship jurisdiction and not deprivation jurisdiction.

The text of ASFA and guidance provided by the Act’s implementing regulations make clear that a “legal guardianship” is an appropriate permanency goal to be considered in the development of case plans and the evaluation of permanency hearings. According to the Final Rule, the statutory definition of “legal guardianship” was “developed to clarify that States should consider legal guardianships that are permanent and self-sustaining as a permanency option for children in foster care.” Thus, the guidepost becomes the concept of permanence and the ways in which that concept is operationalized. As applied to guardianships provided for under Georgia law, only those that are considered to be permanent guardianships satisfy ASFA’s notion of “legal guardianships,” and therefore, only those guardianships arising from post-TPR arrangements or related situations are appropriate permanency goals to consider.

Another planned permanent living arrangement.

Before discussing permanency options under O.C.G.A. Section 15-11-58(i) in detail, it might be beneficial to consider generally what constitutes another planned permanent living arrangement. The Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases (hereinafter referred to as the “Permanency Guidelines”) lists certain characteristics of permanency that should be considered when deciding whether a non-adoptive relationship with a relative or a non-relative is an acceptable permanency plan for the child.

⁵ See Adoption 2002: The President’s Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children. Note that under Georgia’s new guardianship law, effective July 1, 2005, *all* guardians will be required to file with the court annual “personal status reports” concerning the child that must include a description of the minor’s general condition, changes since the last report, and the minor’s needs; all addresses of the minor during the reporting period and the living arrangements of the minor for all addresses; and recommendations for any alteration in the guardianship order.

Those characteristics, which follow, help us understand what we mean by a permanent placement option:

1. A judicially created relationship that is intended to be permanent and self-sustaining; a relationship that will last through the child's minority and continue with lifetime family relationships.
2. A legal relationship that is binding on the adults awarded, care, custody and control of the child;
3. The parents in the permanent family have the right to protect, educate, have care and control of the child, have decision-making authority including medical care and discipline and have the power to represent the child in legal proceedings;
4. The family is free from supervision by the child welfare agency and monitoring by the court;
5. Biological parents cannot petition the court to terminate the relationship; and
6. The court will only consider a change of custody if there is clear and convincing evidence that the custodian is unfit or has abused or neglected the child.⁶

Before holding up O.C.G.A. Section 15-11-58(i) to compare it with that standard, let us take a look at another view of what constitutes another planned permanent living arrangement. The following points are taken from an article in the ABA Child Law Practice, entitled "Reasonable Efforts to Finalize a Permanency Plan for "Another Planned Permanent Living Arrangement"":

1. Another planned permanent planned living arrangement is not a catchall for whatever temporary plan is needed when none of the preferred permanency plans are practical. Rather, it is a truly permanent arrangement that is, in and of itself, the goal for the child.
2. It is intended to be planned, which means the arrangement is intended, designed, considered, premeditated, or deliberate.
3. It is intended to be permanent, which means enduring, lasting, or stable, and the agency must establish the reasons why the living arrangement is expected to endure.
4. The term "living arrangement" includes not only the physical placement of the child, but also the quality of care, supervision, and nurture the child will receive.
5. Another planned permanent living arrangement contemplates more than a specific place for a child to stay. It includes a specific adult or couple (as opposed to an organization) who will be in charge of the child, exercise certain powers and responsibilities, and likely live with the child.
6. Another planned permanent living arrangement contemplates that the caregiver's familial relationship will continue beyond the life of the legal case.
7. Permanent plans under this permanency option should include services that meet the

⁶ "Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases," National Council of Juvenile and Family Court Judges (2000), p. 14.

child's needs, but should also focus on building relationships between the child and those adults who will be a network of support for the child.

8. Another planned permanent living arrangement can certainly include family foster care, but it will usually be foster care with a particular family or individual, and the court order approving that plan should reflect that the arrangement is permanent, and should specify all of the elements of the plan that make it permanent.⁷

The article goes on to discuss what does not constitute another planned permanent living arrangement under federal law, which is so well stated and on point that we are including almost the entire section verbatim:

Long-term foster care. The statute explicitly prohibits long-term foster care as a permanency option. The ASFA statute struck the term "long-term foster care," and the preamble to the ASFA regulations explained that "Far too many children are given the permanency goal of long-term foster care, which is not a permanent living situation for a child. The [compelling reason] requirement is in place to encourage States to move children from foster care into the most appropriate permanent situation available." Long-term foster care is not stable and may disrupt often, leading to frequent moves for the child and instability.

Emancipation. Emancipation is unfortunately what sometimes happens when children leave foster care. It is not a permanency goal because it lacks certain permanency features contemplated by APPLA (another permanent planned living arrangement).

The foregoing provides an emphatic "NO" to the earlier question as to whether traditional long-term foster care and emancipation constitute permanency options for children. Although some of the foregoing discussion in regard to long-term foster care seems to be in conflict, it really is not. Whereas long-term foster care, standing alone, is clearly not an acceptable permanency option for children, placement of a child in foster care, with a specific foster family or individual, that is intended to be permanent, that has significant other characteristics of a planned permanent living arrangement, and that has been found by the court - for specific reasons - to be a permanent living arrangement may be an appropriate permanency option for a particular child.⁸ This may be a fine distinction, but it may be a very important distinction for many children in care. We need to be cognizant of that distinction so that a child in such an arrangement should be classified as being in another planned permanent living arrangement and not in long-term foster care.

⁷ Renne, Jennifer. Reasonable Efforts to Finalize a Permanency Plan for "Another Planned Permanent Living Arrangement." *ABA Child Law Practice*, Vol. 21, No. 3, p. 1.

⁸ See O.C.G.A. § 15-11-58(p), which states: "A disposition may be made under the terms of this Code section only if the court finds that such disposition is in the best interest of the child." See also O.C.G.A. §§ 103(a)(4) and (5), which provide for placements post-termination of parental rights "if the court determines that such placement is the most appropriate for and in the best interests of the child."

The article goes further to list a series of specific questions that should be asked by the court before the court approves a specific planned permanent living arrangement. Reference is made to the article for a more complete understanding of the court's responsibilities. The questions are as follows:

1. Did the agency conduct a timely assessment and provide relevant services when the case first came in?
2. Have other permanency options been fully considered and ruled out for valid reasons?
3. What efforts has the agency made to identify and recruit a permanent placement for the child?
4. What are the child's preferences?
5. What are the compelling reasons why a more preferred permanency plan is not being selected?
6. Is the plan a "permanent living arrangement"?
7. What support structures are being put in place?
8. Does the child have any special needs, and what services is the agency providing?
9. What efforts has the agency made to assess the safety, quality, and stability of the planned permanent living arrangement?

Although the foregoing questions are designed to lead the court in making a reasonable efforts determination, they also constitute a great guide to the court in determining whether the proposed placement is an appropriate permanency option for a child. With that in mind, let us take a look at other permanency options established under O.C.G.A. Section 15-11-58(i). It is recommended that anyone interested in this issue also read the applicable parts of the Implementation Guide to Senate Bill 236, published by the Georgia Model Courts Project in 2003, from which much of the remainder is taken.

Whereas, prior to July 1, 2003, only relatives could be granted extended temporary custody, now qualified individuals and many agencies are eligible. The relative provision is unchanged, but now three classes of persons or agencies have been added to the list of those eligible for extended temporary custody.

Under O.C.G.A. Section 15-11-58(i), the court may place a child in the custody of any non-relative individual who is found by the court to be qualified to receive and care for the child. This change was excerpted from O.C.G.A. Section 15-11-55(a)(2)(A) with the intention of broadening it primarily to provide the ability for "fictive kin" and other bonded, but legally unrelated, persons to receive custody. The change also had the effect of allowing putative fathers to receive extended temporary custody where they are found to be qualified to receive and care for the child. Essentially, there are no limitations as to who may be eligible except that the court has to find that person "qualified".

The second new category of persons eligible for extended temporary custody is a

“suitable individual custodian in another state pursuant to the provisions of Code Section 15-11-89.” Notably, here, the term “suitable” is used rather than “qualified” as it relates to relatives and non-relatives under the first two provisions. Since O.C.G.A. Section 15-11-89, which is included in Part 9 of the Code, Interstate Proceedings, is dependent on county funds to pay for the cost of supervision, it is seldom used, and is even less likely to be used for extended temporary custody.

The third class of those who may be considered for extended temporary custody consists of, “an agency or organization licensed or otherwise authorized by law to receive and provide care for the child which is operated in a manner that provides such care, guidance, and control as would be provided in a family home as defined in the court’s order.” This class of agencies or organizations will be referred to herein as an “eligible agency.” There are several points to consider relative to this provision, as follows:

(a) Custody can be granted to an eligible agency only if the court has made a finding that a placement with a relative, non-relative, or suitable custodian outside the state is not in the child’s best interest. Note also that the court would have already had to have made a finding that making reasonable efforts to effect reunification would be detrimental to the child, and that termination and adoption would not be in the child’s best interest. Therefore, several permanency options have to be eliminated before placement with an eligible agency under subparagraph (i) may be considered.

(b) The agency must be “operated in a manner that provides such care, guidance, and control as would be provided in a family home as defined in the court’s order.”

(c) Whenever a child is placed in the custody of an eligible agency, such agency is charged with the responsibility of notifying the court within ten days in the event its license is placed on probation, suspended, revoked, or surrendered and, in such event, the court shall conduct a judicial review within ten days of such notification to determine whether another placement should be made for the child. Of course, there will be very few placements with eligible agencies, and fewer still the instances when the eligible agency has its license placed on probation, suspended, revoked or surrendered.

Before granting custody to an eligible agency under this subsection, the court should make a finding that the agency is a “family home” in that: (a) it is in a family-like setting in terms of the physical environment; (b) the persons responsible for the care of the child are stable and are intended to care for the child for the duration of the child’s stay in the placement; (c) the placement is intended to be permanent; and (d) the placement has the capacity to meet the ongoing, life-long developmental and special needs of the child. These requirements, though developed without consideration for the earlier discussions in the section, are substantially similar to the requirements recommended by Jennifer Renne in her article.

Not many agencies can meet this definition. Even for those homes that can meet this definition, not many will likely ever seek custody because few of them can afford to meet this

level of care for the child without state assistance, which is lost once custody is granted to the eligible agency. Although a very limited number of eligible agencies will avail themselves of this option, this provision was enacted with WinShape Homes in mind. WinShape Homes meets the definition and it has the financial wherewithal to care for some of the children, not only during minority, but through college and thereafter.

To simplify the issue, a Model Court Order of the Permanency Planning Committee makes it easy to comply with the definition requirement. The model order prompts the person who drafts the court order to find that the placement will provide a family home because:_____. The blank can be filled in adequately simply by stating the qualities of the home that the court concludes makes it a family home, hopefully drawing on some or all of the characteristics listed herein, including Jennifer Renne’s recommendation that the court order “reflect that the arrangement is permanent, and ... include all the elements that make it permanent.”

Considerations before moving from adoption as preferred permanency option.

The Workgroup adopts the provisions of the Adoption 2002 Study that lists certain factors as evidence a court should consider in determining whether adoption is appropriate, and before considering any permanency option other than adoption, with the addition of the final factor, which has been added by the Workgroup:

- Skilled counseling to enable the child to grieve and accept the possibility of adoption when the child is older and/or unwilling to cooperate with adoption;
- Efforts to secure an adoptive family including the use of adoption exchanges and other adoption recruitment efforts;
- All interested inquires have been considered as possible adoptive parents regardless of race or geographic location of the inquiring families;
- Medical and financial subsidies to which the child is entitled have been offered to potential adoptive parents including supports that are available for non-adoptive placements;
- Counseling has been provided to potential guardians about the benefits of adoption;
- The social service agency has engaged in efforts to eliminate other possible systemic barriers to adoption such as availability of services to enable independent living for children with developmental disabilities;
- The child is living with a relative or caregiver who is committed to be a party to a

legal guardianship and agrees to raise the child to adulthood but is not willing to support termination of parental rights and expects to secure a voluntary relinquishment;

- The child's behavior is so violent that he or she cannot live in a family setting of any kind.
- The existence of an established family relationship between the child and siblings or extended family members that are important to the child and would be lost by a termination of parental rights."

The Commentary in the study states that, "When permanent placement with a relative is proper for a child, that placement is best formalized through an adoption. Where adoption is not appropriate for a child, however, Guideline 1c recognizes the importance of some other legally permanent status for the child."

The point of this section is that adoption is the preferred permanency option when a child cannot be returned to his or her birth family, and adoption should be abandoned as the preferred option only after systematically eliminating it as the best option through an exercise like the one contained in this section.

Why have an order of preference?

Some people have questioned why we need an order of preference for permanency options at all. The first reason to have an order of preference for permanency options is to recognize that federal and state laws provide for it, certainly in a broad way. The second reason is that we believe that permanency decisions for children should not be arbitrary, but that the best permanency decisions for children can be made within a structured decision making framework based on a carefully considered order of preference for permanency options founded on the law, good practice, and just plain common sense. We believe that establishing a rational order of preference for permanency options and systematically working through the options in each case is the best way to ensure that the best permanency option is selected for each individual child.

Keep in mind that what we are seeking to do is to establish a presumptive order of preference. This is not to suggest that, in a given situation, as an example, adoption or placement with a relative is the better option for a child than some other form of placement with a person, or even with an entity. We recognize that every case is unique and that there should be no hard and fast rules. However, we also recognize that having and adhering to a structured decision making process has significant value and produces good outcomes for children.

Can the Order of Preference change?

Whereas, we recognize that there is value in having a presumptive order of preference, we also understand the dynamics surrounding a child change, and that the preferences are subject to change as the case progresses through the system. The resulting dynamic is what we refer to as the “shifting order of preference” and is discussed in a later section of this report.

On what are the preferences based?

The Workgroup accepts that there is a generally recognized order of preference for permanency options, which is succinctly stated in the as follows:

When reunification is not appropriate, the next preferred option is adoption by a family with whom the child has a positive existing relationship, such as a relative, foster parent, or adopting family of a sibling. The next preferred option is adoption by a family recruited for the child. A court should consider permanent custody or permanent guardianship as a permanent plan only when adoption has been ruled out or under other exceptional circumstances.⁹

We also know that, in accordance with the Adoption and Safe Families Act of 1997 (hereinafter referred to as “ASFA”), that the permanency options of “another planned permanent living arrangement” cannot be considered until there has been a finding that there is a compelling reason not to select one of the options described above.

Taking into account all of the previous discussions in this report, the Workgroup recognizes that we must consider a number of technical requirements, including the degree of legal security in the placement. That is why, in the final analysis, a number of specific decisions in ranking the options were made based on whether, and to what extent, the placement was legally secure.

The Workgroup also gives great weight to established relationships in the life of the child. In some cases, it was the nature and depth of the relationship that tipped the scales in favor of one option over another. There is support for that in some of the authorities on which we relied. The following is an excerpt from “Adoption 2002: The President’s Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children,” which is quoted extensively because it sums up a lot of the foregoing and, specifically, because it focuses on the importance of established relationships:

This chapter is intended to identify options for legal permanency which States already recognize, or can create, to better serve children in foster care.....The law should provide legally secure alternative permanent placements for children

⁹ “Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases,” National Council of Juvenile and Family Court Judges (2000), p. 6.

who cannot be raised within their family of origin. The emphasis on legally secure permanent placement is meant to provide the child psychological stability and a sense of belonging, and limit the likelihood of future disruption of the parent/child relationship. All State laws authorize adoption of the child, but traditional adoption does not meet the needs of all children in public foster care. Legal options for permanent and legally secure placement should be broad enough to serve the needs of all children in care who are not able to return to their home of origin and could include adoption, permanent guardianship, and standby guardianship.

For children who cannot be reared by one or both of their birth parents, adoption, by relatives or non-relatives, is the preferred option for a permanent legal placement. By providing children with a new family, adoption is most likely to ensure protection, stability, nurturing, and familial relationships that will last throughout their lives. Alternatives to adoption discussed here, such as permanent guardianship, should be used only when adoption has been thoroughly explored and found inappropriate for the needs of a particular child.

These options for permanency reflect the same priority preference for permanency of foster children with relatives that is reflected throughout these Guidelines: (1) safe reunification with the biological parents or a suitable member of the family of origin; (2) adoption; and (3) permanent guardianship. Yet this hierarchy of preference is not inflexible and requires individualized judgments based on the circumstances of each individual child. For example, if a child is psychologically attached to a relative and has been living for an extended time with that relative but the relative cannot or will not adopt, a permanent guardianship with that relative may be preferable to moving the child to a recruited adoptive family. On the other hand, a relative with no established relationship with the child who offers to become a child's caretaker late in the court process may not be as appropriate for adoption as foster parents who have cared for the child for some time and who wish to adopt.

Taking into consideration all that we have talked about, the Workgroup believes that a presumptive order of preference for the various permanency options can be developed and that there are many more variations than the broadly stated options of reunification, placement with a relative, guardianship and another planned permanent living arrangement.

The presumptive order of preference for permanency options.

Before discussing the presumptive order of preference, it should be noted once again that it is the object of this exercise to develop and use a structured approach in selecting the permanency option that is in the best interest of each individual child given that child's unique

circumstance. Inclusive of, and on addition to those factors discussed in the previous section, following are some of the factors that should be considered in selecting the appropriate permanency option for an individual child:

1. Legal security of the relationship. As discussed in the previous section, the degree to which a permanency option is legally secure is an important factor to consider in selecting the appropriate permanency option.
2. Positive existing relationships. Also, as discussed in the previous section, it is important to consider existing relationships in selecting the appropriate permanency plan for each child. As discussed here, we are talking about relationships with the birth parents, foster parents, relatives, and other caregivers.
3. Opportunity to maintain positive relationships with birth parents and other members of the birth family. In selecting the permanency option for a child it is important to consider whether it would be in the child's best interest to maintain a relationship with the birth parents and other members of the extended birth family, and, if so, whether the permanency options considered for the child provided for that opportunity.
4. Sibling groups. There is an increasing emphasis on keeping sibling groups together, and that is certainly a factor that should be considered in selecting the appropriate permanency option for any child, or any group of children. The issue is more complicated with multiple-origin sibling groups. By multiple-origin sibling groups, we mean groups of siblings with one common parent. Of course, it is not unusual for a child to have siblings with different mothers and with different fathers, that is, half-siblings on both sides of the family. Therefore, a relative placement may provide the opportunity to maintain part of a sibling group with relatives, but not the other part or parts of the group. However, the strength of the pre-existing sibling relationship must be evaluated in the appropriateness of a decision to remove a child from the home of an unrelated caregiver to whom the child had attached in order to place the child with a sibling with whom the child had no bond.
5. Age of the child. Age is a very important consideration in selecting the appropriate permanency option for a child. Typically, the older a child is, the more weight should be given to the child's stated preference. Also, it is difficult to talk about age without also considering the relationships with parents, siblings and other members of the child's extended family. For children who are removed at a very young age, the less likely the child will be damaged by placing the child outside the birth family altogether.

6. Ability to meet basic and special needs. The ability of any placement to meet the special needs of any child with special needs is an important consideration.
7. Length of time in the current placement. The length of time the child has spent in the current placement should be considered in selecting the appropriate permanency plan for the child.
8. Reasons relatives did not ask for child earlier. While a strong emphasis is being placed on identifying relative placements early on in the process, before basically saying that a relative who arrives late on the scene should not be considered because he did not come out earlier, we should consider the reasons given by the relative for not coming out earlier, as well as the strength of the prior relationship of that relative to the child.
9. Whether notice was properly given of relatives. On a somewhat related note, consideration should be given as to whether the original relative search was in fact reasonably diligent, and whether the relatives were given notice of the situation and a meaningful opportunity to participate. This is important, if for no other reason, because of the line of appellate cases reversing dispositions in termination cases where the appellate courts concluded that the relatives were not given meaningful consideration for permanent placement. However, in considering relatives that may not have been identified and notified as we would have desired consideration should be given to the line of cases that has favored the placement of a child with the foster parents with whom the child has become attached over a relative that may have been identified late in the process for whatever reason because of the harm that will be done to the child to remove her/him from the home of the foster parent.

Taking into consideration all of the things covered in this report, drawing on the collective expertise and opinions of the Workgroup, and recognizing that we must always be guided by what is in the best interest of each individual child, including considering all of the foregoing factors, the following presumptive order of preference for permanency options has been adopted by the Workgroup, with some noted exceptions where we were unable to reach an agreement. The purpose of this presumptive order is not to create a checklist that directs that any given option be considered above the others. It is intended as a guide to facilitate the selection of the appropriate permanency plan after considering all of the relevant factors. All of the options should be considered before selecting the one most appropriate for the subject child. Notice that guardianship is not listed as an option. That is because the Workgroup has concluded that temporary guardianships are not really permanency options. Rather, temporary guardianships are actually diversions from the deprivation jurisdiction of the juvenile court, and those cases are more appropriately treated as a dismissal of the deprivation action and the entry of a guardianship. The jurisdiction in those cases is guardianship jurisdiction and not

deprivation jurisdiction. Also, permanent guardianships are not included due to their extreme rarity, since there necessarily must be a surrender or judicial termination of parental rights if the parents are still living. See the section on guardianships for a more detailed discussion.

- First Option- Reunification, except in those situations where there is a rebuttable presumption that reunification is not in the child's best interest, as provided for in O.C.G.A. Section 15-11-58(h). It is urged that at the time of the first hearing following removal of the child from its home that the court specifically inquire of the Department as to the existence of any of the factors set forth in that Code section that would support the presumption that reunification services should not be provided. Expediting appropriate cases on these grounds spares the child unnecessary delay in achieving permanency within timeframes that are consistent with the developmental needs of the child and saves time and resources invested in reunification efforts in inappropriate cases.
- Second Option- Adoption with a relative with whom the child has attached, or has at least had a significant preexisting relationship.
- Third Option- Adoption outside the birth family, but with an individual or family with whom the child has attached. This may be foster parents, fictive kin, or a former neighbor, church member, school teacher, or any of a number of persons who have demonstrated an ongoing commitment to the child. This option is ranked above some other options in part because of the legal requirement for a legally secure relationship, and because of the importance of the established relationship.
- Fourth Option- Extended temporary custody with a relative with whom the child has attached, or has at least had a significant preexisting relationship. This option is ranked above the more legally secure option of adoption by a relative with whom the child has had no substantial attachment or relationship because we believe that, in such a case, presumptively, the established relationship would be more important to the child and more in the child's best interest, than trying to obtain a more legally secure, but less established relationship.
- Fifth Option- Extended temporary custody with a non-relative individual who is found by the court to be qualified to receive and care for the child, and with whom the child has attached, or has at least had a significant preexisting relationship. This option is ranked above the more legally secure option of adoption by a relative with whom the child has had no substantial attachment or relationship because we believe that, in such a case,

presumptively, the established relationship would be more important to the child and more in the child's best interest, than trying to obtain a more legally secure, but less established relationship.

Sixth Option¹⁰-

Extended temporary custody with "an agency or organization licensed or otherwise authorized by law to receive and provide care for the child which is operated in a manner that provides such care, guidance, and control as would be provided in a family home as defined in the court's order." This class of agencies or organizations will be referred to herein as an "eligible agency." This option is discussed in detail in an earlier section of this report. This option is not likely to be available very often, but where it is, the Workgroup believes that it will be presumptively more preferred than even adoption by a relative with whom the child has had no substantial attachment or relationship because we believe that, in such a case, presumptively, the established relationship would be more important to the child and more in the child's best interest, than trying to obtain a more legally secure, but less established relationship. Keep in mind that this option applies only where the court has made the appropriate findings, where the court has carefully defined "family home," and where court has found this particular placement to meet those requirements.

Seventh Option-

Adoption by a relative with whom the child has had no substantial attachment or contact.

Eighth Option-

Adoption outside the birth family with an individual or a family without a previous relationship. This is the traditional third party adoption. This is in part because of the legal requirement for a legally secure relationship.

Ninth Option-

Extended temporary custody with a relative with whom the child has no substantial attachment or contact.

Tenth Option-

Temporary custody with a relative or fictive kin who cannot, or will not, adopt or take extended temporary custody, but who makes a substantive long-term commitment to the child. Given the individual facts of a child's case, consider that guardianship might provide a more legally secure option.

Eleventh Option-

A planned permanent living arrangement with a foster family or individual, where the placement has been found by the court to be a permanent placement, and where that finding has been documented in a

¹⁰ DFCS has expressed a philosophical preference for placement in a single-family home, whenever possible, consistent with the child's best interests.

court order.

Twelfth Option- Long term foster care is included as the last permanency option even though it is not generally considered an option. The reality is that, for a variety of reasons, in a very unique and limited set of circumstances, long-term foster care becomes the permanency option for a small group of children. When used, long-term foster care should be formalized with a long-term foster care agreement, and should be enhanced with as many of the characteristics of a planned permanent living arrangement as possible.

Keep in mind that this is merely a presumptive order of preference for permanency options and that there may be very valid reasons to choose one less presumptively preferred option over a more presumptively preferred option. But the point is that it should be done in a structured way and only where the court can make and document specific findings as to why that option is in the best interest of that particular child.

Every case turns on its own unique set of facts and changes as the case progresses. But we must fully and fairly evaluate all of the options, always with an open mind and always with our eyes clearly fixed on what is in the best interest of the child. Permanency planning should be structured process whereby, after considering all of the relevant factors and all of the permanency options and their presumptive order of preference, we systematically select the option that is best for the child, always trying to effect the most safe, secure and predictable placement possible for the child in a timely manner.

Shifting order of preference for permanency options.

As we can see, in a perfect world, at a static point in time, and with a little bit of work, we can list the various forms of permanency in a presumptive order of preference with a moderate amount of debate as to most of the options. But, we do not operate in a perfect world and time is certainly not static in the lives of our children in care. The term “diminishing preference” has been used to refer to reunification with the parents or the birth family as preferred permanency options. The idea is that, although there is a preference for reunification with the parents if at all possible, or with placement with some component of the birth family when reunification with a parent is not possible, that preference diminishes over time. We would suggest that time is but one factor that causes the preference for reunification with a parent or the birth family to diminish, and that there may also be factors which tend to increase the preference rather than diminish it. There are also factors which cause the other permanency options to move up or down in the order of preference. Therefore, this phenomenon may more accurately be described as “a shifting order of preferences.” We have to recognize this and courts need to exercise oversight relative to the permanency plan each time it reviews the case and as conditions or circumstances change. The shifting order of preference can actually be demonstrated on a grid and lists made of the various factors that may cause the lines to shift as to

each permanency option. However, the Workgroup decided that such a demonstration is outside the scope of its work, at least in terms of the initial phase of the project.

Closing Comments.

It has been the intention of the Workgroup to establish a structured way of selecting the best permanency option for each child in foster care, not to direct what the outcome should be in any given situation. As stated before, every case turns on its own unique set of facts and changes as the case progresses. Therefore, we must fully and fairly evaluate all of the options, always with an open mind and always with our eyes clearly fixed on what is in the best interest of the child. Permanency planning should be a structured process whereby, after considering all of the relevant factors and all of the permanency options and their presumptive order of preference, we systematically select the option that is best for the child, always trying to effect the most safe, secure and predictable placement possible for the child in a timely manner.