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STANDBY GUARDIANSHIP FOR INCARCERATED CUSTODIAL PARENTS

ABSTRACT

When a child's custodial parent is incarcerated, the child is left to either live with relatives who do not have the legal authority to make decisions for him or to live with strangers by way of the foster care system. This Note identifies standby guardianship laws as a means to better care for children of incarcerated parents by expanding an already existing legal framework. Currently, standby guardianship laws allow custodial parents suffering from debilitating illnesses to grant legal custody over their children to another adult for the length of their incapacity without terminating their own parental rights. This Note argues for expanding the laws' coverage from parents suffering from serious illnesses to also include custodial parents facing incarceration. Allowing parents, rather than the State, to decide how a child will be cared for while the parent herself is unavailable, is beneficial to the parent, the child, and the State, regardless of whether the parent is ill or incarcerated. This Note explains how switching the inquiry into the child's placement from social services to the court does not compromise child safety and does so in a way that saves state resource expenditure. Additionally, allowing parents to make the placement decision prioritizes the family unit and allows for a more child-centered approach that meets each child's unique needs. Neither the State nor the parent has to worry that the child is being inadequately tended to, while the State saves money and parents get to maintain their parental rights. This Note urges all states to adopt standby guardianship laws that include incarcerated custodial parents among those who may designate an alternate guardian for their children.

INTRODUCTION

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INTRODUCTION

What happens to children when their only parent is sent to prison? It is fairly well-known that the United States has a mass incarceration problem.¹ What is perhaps less well known is that in recent decades there has been a huge increase in the number of women being incarcerated.² “Between 1980 and 2019, the number of incarcerated women increased by more than 700%, rising from a total of 26,378 in 1980 to 222,455 in 2019.”³ With this drastic increase in female incarceration there has been an additional collateral consequence: children are losing their parents because their custodial parents are being locked up.⁴ Although children can live with another relative or trusted adult while their custodial parent is incarcerated, traditionally that adult does not have legal custody of the children.⁵ Without legal custody, that adult cannot make important life decisions affecting the children, such as whether they should undergo medical procedures.⁶ Conversely, when incarcerated parents do not have a trusted adult who can care for their children, the children frequently become wards of the State.⁷ The State, wanting to look after the best interests of the children, may then terminate the incarcerated parent’s parental rights in order to grant legal custody and control to other adults who can provide a more permanent family

1. Despite making up only about five percent of the global population, the U.S. has more than twenty percent of the world’s prison population. Today, around 2.3 million people in the U.S. are in a prison, jail, or detention facility of some kind. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/PT5M-DKBW>].

2. THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (June 06, 2019) [hereinafter INCARCERATED WOMEN AND GIRLS], <https://www.sentencingproject.org/publications/incarcerated-women-and-girls> [<https://perma.cc/VBJ5-BGS7>].

3. *Id.*

4. Sixty-four percent of incarcerated women compared to 47% of incarcerated men identify as the sole or custodial parent of at least one child. Stephanie C. Kennedy et al., *I Took Care of my Kids’: Mothering While Incarcerated*, HEALTH & JUST. J. 1, 2 (2020). Because incarcerated women are more likely to be the custodial parent, this Note will generally refer to the custodial parent with female pronouns, however, standby guardianship laws may be applied to fathers as well as mothers.

5. For example, “[m]ore than half of incarcerated women’s children live with a grandparent” while the mother is in prison. *Id.*

6. See Joyce McConnell, *Standby Guardianship: Sharing The Legal Responsibility For Children*, 7 MD. J. CONTEMP. L. ISSUES 249, 262 (1996). Although “[i]ncarcerated fathers indicate that the overwhelming majority of their children (in excess of 90%) live with their mothers while the father is in prison, incarcerated mothers describe a complex web of formal, informal, and state-appointed caretakers.” Kennedy et al., *supra* note 4, at 2.

7. See Kennedy et al., *supra* note 4, at 2. “The children of incarcerated mothers are eight times more likely to be placed in foster care and seven times more likely to be placed in a group home or institutional setting when compared to the children of incarcerated fathers.” *Id.*

setting.⁸ However, just because the State severs biological parents' rights so that their children may be eligible for adoption, there is no guarantee that the children will actually be adopted; this framework can leave the children cut off from their parents, siblings, and extended family without providing an alternative.⁹ through the currently existing process, parents and children are permanently separated and traumatized, and their input is largely ignored.¹⁰ Standby guardianship laws provide an alternative legal process that strengthens the family unit by allowing parents, in the event they become temporarily unable to care for their children, to designate a temporary guardian while leaving their parental rights intact.¹¹

As may already be evident from the discussion thus far, the population that will be most affected by expanded coverage of standby guardianship laws will be women and their children because women are far more likely than men to be sole custodial parents.¹² And women of color and their children are likely to be more affected than white women and their children.¹³ However, states with largely white populations should not take the view that expanding their standby guardianship laws is only minimally relevant to them.¹⁴ Given that the rate of white women being incarcerated is increasing while the incarceration rate of women of color is decreasing, standby guardianship

8. Mothers and fathers who have a child placed in foster care because they are incarcerated—but who have not been accused of child abuse, neglect, endangerment, or even drug or alcohol use—are more likely to have their parental rights terminated than those who physically or sexually assault their kids . . . 1 in 8 . . . incarcerated parents lose their parental rights, regardless of the seriousness of their offenses . . .

Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 2, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [<https://perma.cc/F2VG-R746>]. Additionally, the Adoption and Safe Families Act (ASFA), enacted by Congress in 1997, mandates that state social services file petitions to terminate parental rights if a child has been in foster care for fifteen of the last twenty-two months. Lois M. Davis et al., *The Impact of Incarceration on Families: Key Findings*, in UNDERSTANDING THE PUBLIC HEALTH IMPLICATIONS OF PRISONER REENTRY IN CALIFORNIA: STATE-OF-THE-STATE REPORT 117, 121 (2011).

9. Myrna S. Raeder, *Special Issue: Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 27 (2012).

10. See Hager & Flagg, *supra* note 8.

11. See *Standby Guardianship*, CHILDREN'S BUREAU CHILD WELFARE INFO. GATEWAY 1, 8 (2018) [hereinafter CHILDREN'S BUREAU], <https://www.childwelfare.gov/pubPDFs/guardianship.pdf> [<https://perma.cc/C356-6ZLW>].

12. See Kennedy et al., *supra* note 4, at 9.

13. As of 2019, Black women were incarcerated at a rate of over 1.7 times that of white women, and Latinx women were imprisoned at a rate of 1.3 times that of white women. INCARCERATED WOMEN AND GIRLS, *supra* note 2, at 3.

14. In the last twenty years, the rate of Black women imprisoned has dropped by 60% while the rate of white women imprisoned has increased by 41%. *Id.*

laws may become a vital legal mechanism to help the women and children in these states too.¹⁵ Women of all racial backgrounds are likely to be affected given the alarming trends of increased female incarceration overall, and therefore the issue concerns all states, not just those with large minority populations.¹⁶

Another, although perhaps overlapping, subset of the population likely to be more greatly affected by expanded standby guardianship laws are those earning low incomes; women of lower socioeconomic status and their children are likely to benefit from this expansion more than their upper and middle-class counterparts.¹⁷ Women living on tighter budgets have less access to attorneys and therefore wills, which are one of the current guardianship mechanisms used by the wealthier classes.¹⁸ Paying attorneys to draft legal documents is simply not a feasible option for those with minimal resources, and therefore, they are the ones most in need of an alternate legal pathway to protect their children.¹⁹ All states, regardless of the racial or socioeconomic makeup of their population, are likely to feel the effects of these standby guardianship laws, if they allow incarcerated custodial parents to utilize standby guardianship laws.²⁰

This Note argues that states should adopt standby guardianship laws and expand their application to include incarcerated custodial parents. Part I of this Note addresses what standby guardianship laws are and how they came about. Part II looks at the increase in state adoption of standby guardianship laws as well as how states have already expanded their definitions to include additional categories of parents who can invoke standby guardianship laws. Part III explores the key characteristics of parents who currently may appoint standby guardians and emphasizes the similarities that exist between them and incarcerated parents, concluding that the law should therefore apply to incarcerated parents as well. Parts IV and V recommend processes for implementing and then safely terminating standby guardianship for incarcerated parents. Finally, Part VI focuses on the benefits of standby guardianship to children because making sure they are properly cared for is the ultimate goal of the law. Allowing custodial parents facing imprisonment to designate a

15. *See id.*

16. *See id.*

17. *See* Deborah Weimer, *Implementation of Standby Guardianship: Respect for Family Autonomy*, 100 DICK. L. REV. 65, 68 (1995).

18. *See id.*

19. *See id.*

20. *See* Weimer, *supra* note 17, at 68; INCARCERATED WOMEN AND GIRLS, *supra* note 2, at 4.

legal guardian to stand in as their child's parent, without terminating parental rights, is in the best interest of the child, the parent, and the State. States should adopt standby guardianship laws and ensure that incarcerated custodial parents are included within the laws' coverage.

I. WHAT IS STANDBY GUARDIANSHIP?

Standby guardianship laws create a way for a parent to temporarily transfer legal custody of her child to another adult while the parent is still alive but is incapacitated.²¹ Although it may seem intuitive that parents have an ongoing obligation to care for their children, the legal duty of care exists because the State creates a legal relationship, "legal guardianship," which specifies the responsibilities and powers adults have with respect to children in their care.²² Every state allows a parent to transfer this legal relationship to another adult in a will instrument so that if the parent should die, there is another adult designated to care for the child.²³ However, a will is not always an effective tool for transferring guardianship because it only applies upon a parent's death.²⁴ There are situations that arise that require an alternate guardian because a parent is unable to properly care for her child but the parent is still alive.²⁵ One such situation is when a parent has a disabling medical condition or terminal illness that leads to either temporary or permanent incapacity.²⁶ States acknowledged this possibility exists and began responding to it in the 1990s when they created standby guardianship laws.²⁷ Today, a little more than half of U.S. states have some sort of standby guardianship law in place.²⁸

21. CHILDREN'S BUREAU, *supra* note 11, at 1. Situations where parents need to invoke standby guardianship laws typically arise for single parents because in two-parent families, the child already has an alternate adult with legal custody over him who can step in when the custodial parent becomes incapacitated. Peter H. Mosanyi, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. L. 253, 256 (2002).

22. CHILDREN'S BUREAU, *supra* note 11, at 1; *see also* Weimer, *supra* note 17, at 67.

23. CHILDREN'S BUREAU, *supra* note 11, at 1.

24. Weimer, *supra* note 17, at 68.

25. *Id.*

26. *Id.*

27. States initially instituted these laws in response to the AIDS crisis, which was killing a lot of single Black mothers, leaving states scrambling to find new guardians for children despite the foreseeability of the parental incapacity. *Id.* at 65.

28. As of 2018, Washington, D.C., and the following 29 states have passed some version of this type of law: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania,

Standby guardianship laws allow a parent to designate a selected adult as an alternate guardian for her child as long as that selected adult consents to the arrangement.²⁹ When the parent or standby guardian petitions the court to establish this alternate guardianship for the child, the court briefly examines the facts to ensure an alternate guardian is necessary, both the parent and appointed guardian consent to the standby guardianship, and that the guardian is an appropriate person capable of caring for the child.³⁰

The guardianship can go into effect during the parent's lifetime and may continue after her death if necessary.³¹ The parent retains a lot of control over the alternate guardianship; she may determine when it begins (unless a triggering event automatically starts it) and she may withdraw the authority granted to the standby guardian if the arrangement is no longer agreeable.³² In the vast majority of states with standby guardianship laws, "the parent shares decision-making responsibilities with the guardian."³³ Importantly, parental rights are not terminated by the activation of the standby guardian, the way they would be in any other transfer of guardianship from a parent to another non-parent adult.³⁴

In a standby guardianship, the guardian is expected to take responsibility when needed and step back when the parent is again capable of caring for the child.³⁵ The standby guardian's parental rights are not automatically terminated upon the rehabilitation of the previously incapacitated parent; rather, the parent must petition the court to terminate the alternate guardian's parental rights.³⁶ This allows for a smoother transition between the legally responsible adults when the alternate guardianship is terminated.³⁷ Standby guardianship in its current form is therefore relatively comprehensive in its process in order to ensure child welfare. Its problem is that it currently excludes a group of people, incarcerated custodial parents, who would greatly benefit from access to it.

Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin. CHILDREN'S BUREAU, *supra* note 11, at 1.

29. *Id.*

30. See, e.g., N.Y. SURR. CT., *Petition for Appointment of a Standby Guardian*, <https://www.nycourts.gov/LegacyPDFS/FORMS/surrogates/pdfs/Fillable-Guardianship-Petition-StandbySG-1through9.pdf> [<https://perma.cc/FM3P-KTXA>].

31. CHILDREN'S BUREAU, *supra* note 11, at 1.

32. *Id.* at 2–4.

33. *Id.* at 2, 3.

34. *Id.*

35. *Id.*

36. See *id.* at 4.

37. See CHILDREN'S BUREAU, *supra* note 11, at 2–3.

II. THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

New York was the first state to enact standby guardianship laws in 1992.³⁸ While a handful of states, like New York, enacted standby guardianship laws on their own, there was a big boom in state enactments of these laws after the Uniform Law Commission (ULC) offered a model for states to adopt in 1997.³⁹ Prior to 1997, when the ULC published its uniform standby guardianship law, only eight states had some sort of standby guardianship law on the books.⁴⁰ Today, about half of U.S. states have them.⁴¹

The first guardianship law models promulgated by the ULC were in the 1969 Uniform Probate Code.⁴² Then in 1982 the ULC separated the guardianship laws out from the probate laws into a free-standing act called the Uniform Guardianship and Protective Proceedings Act (UGPPA).⁴³ In 1997 the ULC revised UGPPA significantly, after which most states with standby guardianship laws enacted their versions.⁴⁴ Most recently, in 2017, the ULC renamed UGPPA to the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), and revised it, making notable changes to the standby guardianship model.⁴⁵

The 1997 version proposed laws regarding appointment of legal guardianship for minors, including the concept of standby guardianship (although it was not explicitly called that except within the comments).⁴⁶ The updated 2017 version gave standby guardianship its own dedicated section, reflecting its growing prominence and the need to address it independently from other issues pertaining to the

38. N.Y. Surr. Ct. Proc. Act § 1726.

39. Founded in 1892, the ULC, also known as the National Conference of Commissioners on Uniform State Laws, is a group of legislators, judges, law professors and attorneys from every U.S. state that meets and drafts non-partisan model and uniform laws intended for state adoption. UNIF. L. COMM'N (2022), <https://www.uniformlaws.org/about-ulc/overview> [<https://perma.cc/6A2C-AB7G>]; Erica Wood, *New Uniform Act Boosts Guardianship Reform*, BIFOCAL (Oct. 15, 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol--39/issue-1--october-2017/-new-uniform-act-boosts-guardianship-reform [<https://perma.cc/MKA7-3XQT>].

40. Joshua S. Rubenstein, *Standby Guardianship Legislation Summer 2019*, 12 EST. PLAN. & CMTY. PROP. L.J. 287, 289 (2019).

41. *Id.*

42. Wood, *supra* note 39.

43. *Id.*

44. *Id.*; Rubenstein, *supra* note 40, at 289.

45. See UNIF. GUARDIANSHIP AND PROTECTIVE PROC. ACT § 202 (UNIF. L. COMM'N 1997); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 207 (UNIF. L. COMM'N 2017).

46. See UNIF. GUARDIANSHIP AND PROTECTIVE PROC. ACT § 202 (UNIF. L. COMM'N 1997).

legal guardianship of minors.⁴⁷ Most importantly, the latest iteration now includes in its description that standby guardianship laws should extend beyond physically and medically incapacitated parents, and should apply to incarcerated parents (and parents facing immigration and deportation proceedings as well).⁴⁸

Some states are already following the lead of this 2017 revision and its aim of facilitating better family planning.⁴⁹ For example, Maryland, in 2018, and New York, in 2019, updated their standby guardianship laws to include parents facing immigration proceedings.⁵⁰ Other states are continuing to follow that trend and are actively debating changing their standby guardianship laws to include incarcerated parents as well as parents facing deportation.⁵¹

As of the writing of this Note, at least two states, Vermont and Virginia, have expanded their definition of children who need and are entitled to an alternate guardian, to include children whose custodial parent is incarcerated.⁵² Virginia very recently, in March of 2021, amended its standby guardianship laws.⁵³ Vermont, on the other hand, expanded the application of its guardianship laws to include incarcerated parents in 2013.⁵⁴

Vermont's amendment was made prior to the ULC's recommendation to do so in 2017.⁵⁵ Vermont does not use the term standby guardianship in its statute and therefore may not explicitly be working within the standby guardianship framework.⁵⁶ However, some of the other listed circumstances within the statute that address when a child needs a guardian appear to be heavily influenced by standby guardianship.⁵⁷ For example § 2622(2)(A)(i) provides for a guardian if "[t]he child's custodial parent has a serious or terminal

47. *Supra* note 45.

48. *Id.*

49. *See id.*

50. MD. EST. & TRUSTS CODE ANN. §§ 13-901 to 13-904; N.Y. Surr. Ct. Proc. Act § 1726.

51. The Virginia state legislature, in the 2021 session, considered a proposal to expand standby guardianship laws to include children whose parents are at risk of incarceration, detention, or deportation. S. B. 1184 Gen. Assemb. (Va. 2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1184>. The author is excited to share that while making final edits to this Note, the Virginia legislature in fact passed a bill with the proposed amendments to the standby guardianship laws and the governor signed it into law. *See* VA. CODE ANN. § 16.1-351 (2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0241&212+ful+CHAP0241> [<https://perma.cc/P9U5-ZE4Y>].

52. VT. STAT. ANN. tit. 14, § 2622(2)(A)(iv); VA. CODE ANN. § 16.1-351.

53. VA. CODE ANN. § 16.1-351.

54. *Supra* note 52.

55. *Id.*

56. *Id.*

57. *See supra* note 52, § 2622(2)(A)(ii)–(iii).

illness” and § 2622(2)(A)(ii) provides for a guardian if, “[a] custodial parent’s physical or mental health prevents the parent from providing proper care and supervision for the child.”⁵⁸ Regardless of whether Vermont was influenced by the UGCOPAA, it is an example of how each state may uniquely implement the ideas encompassed by standby guardianship.⁵⁹ In fact, direct adoption of the ULC model acts has not been plentiful, with only five states (Alabama, Colorado, Hawaii, Massachusetts, Minnesota) and Washington, D.C., enacting UGPPA, and two states (Maine and Washington) enacting UGCOPAA.⁶⁰

Since about half of U.S. states do have standby guardianship laws but only seven have adopted the ULC model laws, it is clear that states prefer to use the model more as a reference than as an absolute authority on the matter.⁶¹ The model law created by the ULC provides the crucial issues that need addressing, but each state should implement a guardianship solution in the way that best integrates with its existing laws and serves its constituents.⁶²

III. WHY THE APPLICATION OF THIS LAW SHOULD BE EXPANDED TO INCARCERATED PARENTS

The scope of standby guardianship laws in the states that have adopted them is limited to qualifying parents.⁶³ Qualified parents are generally defined narrowly as those parents who are unable to look after the welfare of their children because they are physically or mentally incapacitated due to a medical condition.⁶⁴ Incarceration,

58. *Supra* note 52, § 2622(2)(A)(i)–(ii).

59. *See supra* note 52, § 2621. This section addresses the policy behind and the purpose of guardianship appointment for minors and addresses core themes focused on throughout this Note: there is need for a legal avenue that accounts for parental input in care of a child when a parent becomes unavailable to provide that care personally, parents have a right to make decisions impacting how their children are raised, and children and families are better served when an ongoing parent-child relationship remains intact.

60. UNIF. L. COMM’N, *Guardianship and Protective Proc. Act* (2022), <https://www.uniformlaws.org/committees/community-home?CommunityKey=d716e47d-f50b-4b68-9e25-dd0af47a13b7> [<https://perma.cc/4HMM-VSAQ>]; UNIF. L. COMM’N, *Guardianship, Conservatorship, and Other Protective Arrangements Act* (2022), <https://my.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c&CLK=d654559b-a809-4e99-b530-5e1639fe715f> [<https://perma.cc/RZ2M-WYYE>].

61. *Supra* note 60.

62. Vermont and Virginia serve as examples because their implementation is different but leads to the same outcome. *Compare supra* note 52, § 2622(2)(A)(iv), with *supra* note 52, § 16.1-351. Vermont’s laws implicate standby guardianship indirectly while Virginia’s law specifically calls it standby guardianship, but both allow incarcerated parents to appoint an alternate guardian for their children. *See supra* note 52, § 2622(2)(A)(iv); § 16.1-351.

63. *See* Rubenstein, *supra* note 40, at 293.

64. CHILDREN’S BUREAU, *supra* note 11, at 50. However, there are a small handful of states that have expanded the laws to apply to parents facing immigration proceedings,

however, is also a form of physical incapacitation that affects a parent's ability to care for the needs of a child in similar ways to medical incapacity.⁶⁵ Because the parent is locked up, she cannot provide financially or emotionally for her child's well-being; she is not available to look after her child's behavior or ensure the child is educated, housed, bathed, and fed.⁶⁶ This unavailability is no different from the absence of a parent who has experienced a psychotic episode or suffers from a terminal illness which separates her physically and mentally from her child.⁶⁷ A parent's medical incapacity or incarceration both leave a child vulnerable and create a need to enlist the help of another adult.⁶⁸ They also both involve a parent who may only be temporarily unavailable.⁶⁹

State legislatures enacted these standby guardianship laws for use in circumstances of parental incapacity that are similar to those faced by incarcerated parents, and therefore, those parents should also be allowed use of these laws.⁷⁰ For example, New York, Maryland, and Illinois were all early adopters of standby guardianship laws and they enacted them in response to the unfortunately large population of single mothers within their states who were slowly dying from HIV/AIDS.⁷¹ This particular medical condition allows people to live for many years without being debilitated by it; however, once the symptoms become severe enough, they can cause incapacity.⁷² These single mothers knew that they would one day, in the not-too-distant future, become less able to care for their children, but had no legal means to appoint another guardian for their children until after they died, unless they were willing to terminate their parental rights.⁷³ It was entirely foreseeable that this incapacitation would occur, but parents and children were helpless to proactively address it.⁷⁴

see, e.g., MD. EST. & TRUSTS §§ 13-901 to 13-904, or incarceration, *see, e.g., supra* note 52, § 2622(2)(A)(iv).

65. *See* Patricia Allard, *When The Cost Is Too Great: The Emotional And Psychological Impact On Children Of Incarcerating Their Parents For Drug Offences*, 50 FAM. CT. REV. 48, 51 (2012).

66. *See id.*

67. *See, e.g.*, Weimer, *supra* note 17, at 81 (detailing one instance in which a mother passed away and a guardian assumed physical custody of the children).

68. *See id.*

69. *See id.* (detailing the experience of a terminally ill mother who retained ongoing visitation after her daughter was adopted).

70. *See id.* at 69–70 (explaining that standby guardianship statutes provide flexible arrangements for parents who are expected to be unavailable within a limited time).

71. *Id.*

72. *See id.* at 71 (highlighting the flexibility of the standby notion).

73. Weimer, *supra* note 17, at 81 (giving an example in which a terminally ill mother appointed guardianship in her will).

74. *See id.* at 66 (explaining that standby guardianship statutes provide a degree of proactivity).

The legislative focus at the time of enactment was therefore on circumstances that would foreseeably lead a parent to be unable to look after the well-being of her child and could be readily tied to a triggering event.⁷⁵ The foreseeability was key to why the laws were necessary because it allowed a proactive approach to a nearly certain impending problem: untended to children.⁷⁶ The triggering event delineated a clear start to when a non-parent adult was immediately allowed to make legal decisions on behalf of a child whose parent was alive, retained her parental rights, and would otherwise typically make these decisions at her sole discretion.⁷⁷ Additionally, implementing standby guardianship laws was beneficial to the State's objectives of minimizing disruption to children's lives, and saving state agencies' time and resources they would otherwise have to expend finding suitable alternate guardians.⁷⁸

Custodial parent incarceration has a similar foreseeability and triggering event, and it also mitigates against the same expenditures states end up making when parents are medically incapacitated.⁷⁹ A custodial parent is on notice of possible prison time when she is arraigned for a crime and therefore she knows in advance of her sentencing that an alternate guardian may be needed for her child.⁸⁰ A guilty plea, denial of bail pending trial, or a sentence of prison time are each clear "triggering events" that are just as evident to the court as a doctor's note would be in indicating that the time has come for the alternate guardian's new legal status to kick in.⁸¹ And just as standby guardianship relieves social services from having to intervene when a child has a parent who becomes debilitated due to a terminal illness, it similarly unburdens state social services when a suitable alternative guardian can be designated for a child whose custodial parent is facing incarceration.⁸²

75. *See id.* at 66, 68–69 (suggesting the proactivity provided by standby guardianship statutes has been in recognition of the experience of terminally ill parents).

76. *See id.* at 68 (noting the experience of children).

77. *See* CHILDREN'S BUREAU, *supra* note 11, at 2–3; Weimer, *supra* note 17, at 70.

78. Weimer, *supra* note 17, at 65–69.

79. *See, e.g.*, Lauren Baldwin, *Criminal Arraignment: What to Expect*, NOLO, <https://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-defense-case/criminal-arraignment-what-expect> [<https://perma.cc/5BTD-ASB9>] (last visited Apr. 7, 2022); U.S. DEP'T OF HEALTH & HUM. SERV., REPORT TO CONGRESS ON STATE CHILD WELFARE EXPENDITURES 1–2 (2019) [hereinafter REPORT TO CONGRESS ON STATE CHILD WELFARE EXPENDITURES], <https://www.acf.hhs.gov/cb/report/annual-report-congress-state-child-welfare-expenditures-reported-cfs-101-2019> [<https://perma.cc/HAZ5-HWKU>].

80. *See, e.g.*, Baldwin, *supra* note 79 (describing a court's decisions regarding detention at the arraignment).

81. Some states require a physician's note documenting the incapacity before the standby guardianship can be activated. CHILDREN'S BUREAU, *supra* note 11, at 2–3.

82. *See, e.g.*, Weimer, *supra* note 17, at 69.

The burden on state social services when they have to take care of children whose parents are incarcerated is not small.⁸³ The report created by the U.S. Department of Health and Human Services (HHS) for Congress, which lays out the total anticipated budget of all fifty states and the District of Columbia for the upcoming year, provides an illustration of the annual costs of social services in various states.⁸⁴ The 2019 report showed that the anticipated budget for all services under the Stephanie Tubbs Jones Child Welfare Services Program, for example, was \$271,714,605.⁸⁵ Out of that total, \$36,253,466 was earmarked for foster care and adoption related services, \$26,132,188 was earmarked for family reunification, and \$130,526,199 was earmarked for protective services.⁸⁶ The bulk of expenses for child services, roughly forty-eight percent of the budget, is expended on children in neglected and dangerous situations.⁸⁷ However, states still spend millions of dollars on foster care/adoption and then reunification, as evidenced by the fact that it makes up roughly seventeen percent of the social services budget.⁸⁸ If incarcerated parents are allowed to appoint standby guardians, thus keeping children out of social services entirely, the State can either reallocate those funds to other programs or save the money altogether.⁸⁹

Aside from financial considerations, when the custodial parent is allowed to designate a guardian, she is able to do what a social services agency cannot do equally well: choose a person the child already knows, who is capable of handling the responsibility of caring for the child's fiscal, physical, and emotional well-being, and facilitate a relatively smooth guardianship transition.⁹⁰ Because the circumstances of incarcerated custodial parents and medically incapacitated ones with regard to child-rearing, as well as the effects on their children, are the same, there is no reason for legislatures to exclude incarcerated parents from standby guardianship laws.

83. See, e.g., REPORT TO CONGRESS ON STATE CHILD WELFARE EXPENDITURES, *supra* note 79, at 1–4 (providing planned expenditures for family support services).

84. *Id.* at 1.

85. See U.S. DEP'T OF HEALTH & HUM. SERV., *Stephanie Tubbs Jones Child Welfare Serv. FFY 2019 Planned Use of Funding by State and Serv. Category 2* (2019), https://www.acf.hhs.gov/sites/default/files/documents/cb/cfs101_congress_2019_att_c.pdf [<https://perma.cc/NQX8-78GG>].

86. *Id.*

87. See *id.* (showing the amount of protective services expenses relative to total spending by states).

88. See *id.* (showing the amount of reunification and foster services expenses relative to total spending by states).

89. See U.S. DEP'T OF HEALTH & HUM. SERV., REPORT TO CONGRESS ON STATE CHILD WELFARE EXPENDITURES 1, 7 (noting the project's flexibility and the discretion states have in targeting funds).

90. Weimer, *supra* note 17, at 65–67.

IV. PROCEDURAL IMPACT AND RESOURCE REALLOCATION

Allowing standby guardianship laws to apply to incarcerated parents will shift the resource burden from state social service agencies over to the courts.⁹¹ While this shift will require the court to enact some procedural changes, the changes will be minimal.⁹² Courts already takes the additional step of determining a person's financial status when a criminal defendant is brought before the court for a charge that carries a potential prison sentence.⁹³ When the defendant is brought before the court for arraignment, the court makes a brief inquiry into the defendant's finances in order to determine if she is eligible for a public defense attorney.⁹⁴ Determining how many children the defendant has and if she is the custodial parent or is responsible for child support is already part of court procedure to determine financial need.⁹⁵ Since the court is already inquiring into her status as a custodial parent, the only change in process is that an answer of "yes" will now signal to the court to provide informational pamphlets and the necessary forms for appointing a standby guardian.⁹⁶ This change will affect attorneys representing the defendants more than the court itself because the attorneys are likely to be the ones to explain and assist with the new paperwork.⁹⁷

While the criminal court (or the attorneys representing the clients before this court) will provide the information regarding appointing a standby guardian, the court that actually processes the

91. *See, e.g.*, REPORT TO CONGRESS ON STATE CHILD WELFARE EXPENDITURES, *supra* note 79, at 1; UNIF. GUARDIANSHIP AND PROTECTIVE PROC. ACT §§ 201, 206 (UNIF. L. COMM'N 1997) (suggesting an active role of courts in the appointment of guardians).

92. *See, e.g.*, AM. BAR ASS'N, *Frequently Asked Questions*, https://www.americanbar.org/groups/legal_services/flh-home/flh-faq [<https://perma.cc/BFH8-7HQJ>] (last visited Apr. 7, 2022).

93. Under the Sixth Amendment of the United States Constitution, a criminal defendant facing possible incarceration is entitled to legal representation whether in a state court or a federal court. *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963). Therefore, if the defendant is indigent and would like to be represented by an attorney, courts will appoint either a public defender or a private attorney who will be paid by the locality to defend these cases. AM. BAR ASS'N, *supra* note 92.

94. The court must inquire into the defendant's finances to ensure compliance with her constitutional right to have counsel. *See supra* note 92. This involves inquiring into any assets, income, debt, and household configuration, among other factors pertaining to her finances. *Id.*

95. *See, e.g.*, United States Federal Court financial affidavit for a defendant to submit in support of a request for an attorney, <https://www.uscourts.gov/sites/default/files/cja23.pdf> [<https://perma.cc/WTD9-L96S>].

96. *See id.*

97. Public defenders already help with a variety of paperwork; for example, they might assist a client fill out the correct forms to transfer assets so the client can post bail. *See, e.g.*, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Felony Offenses*, <https://www.ndcalfpd.org/felony-offense> [<https://perma.cc/TY85-3XFP>].

filing is likely to be a different court.⁹⁸ Some states include standby guardianship under their probate code because of its close relationship to guardianship generally, and therefore the matter might go to probate court.⁹⁹ Other jurisdictions might prefer to deal with a matter about child custody in a family or juvenile and domestic relations court.¹⁰⁰ Family courts may be particularly well-suited to decide standby guardianship appointments because they already hear child custody cases regularly.¹⁰¹

Regardless of which court ultimately processes the standby guardianship paperwork, initiating the decision-making process at arraignment will allow the parent enough time to elect a standby guardian, confirm the alternate guardian's willingness to take on the designation, and file the necessary forms with the court in advance of sentencing.¹⁰² With the paperwork already filed in the appropriate court, if the triggering event leading to prison time occurs, the court responsible for the standby guardianship order will be in a position to hear or process the standby guardian's petition right away.¹⁰³ If the alternate guardian is deemed suitable, the guardian's legal rights over the child become effective as soon as possible.¹⁰⁴

A quick and smooth transition like this is beneficial for all affected parties.¹⁰⁵ The incarcerated parent can have peace of mind knowing her child is being cared for by an adult she has chosen and who has the legal rights to act in both every day and emergency situations involving the child.¹⁰⁶ The child's life will be minimally

98. See, e.g., *supra* note 52, § 2623(a).

99. See, e.g., CHILDREN'S BUREAU, *supra* note 11, at 9–20 (detailing the role of probate courts in several states' standby guardianship schemes).

100. See UNIF. GUARDIANSHIP AND PROTECTIVE PROC. ACT § 204 (Comments) (noting that certain matters involving custody are handled by juvenile courts).

101. See Christopher Coble, *What Happens When Custodial Parent Goes to Jail?*, FINDLAW (Apr. 10, 2017, 1:00 PM), https://blogs.findlaw.com/law_and_life/2017/04/what-happens-when-custodial-parent-goes-to-jail.html [<https://perma.cc/P9E7-H76F>]; *How Child Custody Decisions Are Made*, FINDLAW (Mar. 18, 2019) [hereinafter *How Child Custody Decisions Are Made*], <https://family.findlaw.com/child-custody/how-child-custody-decisions-are-made.html> [<https://perma.cc/BBB2-R39G>].

102. For clarity on the process, first a parent files a document with the court designating a standby guardian. See, e.g., *supra* note 45 (allowing a parent to nominate a standby guardian through a signed record with the court). Then after the triggering event, either the parent or the standby guardian files additional paperwork, attaching proof that the triggering event occurred and requesting that the standby guardian's legal status be "activated." See, e.g., *id.*

103. See, e.g., *supra* note 45 (noting that a hearing is not required for a court to appoint a standby guardian).

104. See, e.g., *id.* (empowering a standby guardian when no parent of the minor can exercise custodial duties).

105. See Weimer, *supra* note 17, at 71.

106. See *id.* (suggesting convenient flexibility for a parent relying on standby guardianship).

disrupted because he will not have to deal with social services and can instead begin bonding with and adjusting to the new living situations with his standby guardian.¹⁰⁷ Because social services do not need to be involved, the State saves time, personnel, and money resources.¹⁰⁸

Aside from the money the State saves by not having to place children in social services, mothers who are allowed to maintain relationships with their children, and who are able to resume care of them post-incarceration, have reduced recidivism rates which means the State reduces its costs for imprisoning the mother again in the future.¹⁰⁹ Instead of the State expending resources to have social workers figure out where to place the child, or tax dollars being allocated to keep more women imprisoned, the State's only involvement becomes through the court system.¹¹⁰ And the court is perfectly capable of making fact-finding determinations regarding the fitness of the standby guardian to care for the child; after all, courts handle child custody disputes every day.¹¹¹

By extending standby guardianship to incarcerated parents, the State actually saves resources that it otherwise often has to expend when a custodial parent is released from prison.¹¹² When a person is released from prison, she has often lost her job, her source of income, and may also have lost her home.¹¹³ These are conditions that would require social services to step in and remove the children from her custody because they cannot be adequately cared for without a home and without money to ensure they are fed and clothed.¹¹⁴ Although an incarcerated parent retains parental rights under standby guardianship laws and therefore can resume care and custody of her child after her release, standby guardianship laws do not have an automatic termination trigger.¹¹⁵ The parent does not

107. See Allard, *supra* note 65, at 55.

108. See *id.* at 52.

109. See Steve Christian, *Children of Incarcerated Parents*, NAT'L CONF. OF STATE LEGISLATURES, Mar. 2009, at 4, <https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf> [<https://perma.cc/J3RY-N4WF>] (pointing to research that suggests maintenance of family ties is connected with lower recidivism rates).

110. Allard, *supra* note 65, at 51.

111. *How Child Custody Decisions Are Made*, *supra* note 101.

112. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *AFTER INCARCERATION: A GUIDE TO HELPING WOMEN REENTER THE COMMUNITY* 1, 21 (2020) [hereinafter *AFTER INCARCERATION*], https://store.samhsa.gov/sites/default/files/SAMHSA_Digital_Download/PEP20-05-01-001_508.pdf [<https://perma.cc/T467-BSWB>] (detailing financially driven recidivism).

113. Christian, *supra* note 109, at 7.

114. Carrie Craft, *Reasons Children Enter the Foster Care System*, VERYWELL FAMILY (June 13, 2020), <https://www.verywellfamily.com/top-reasons-children-enter-foster-care-27123> [<https://perma.cc/SRU3-MPU3>].

115. CHILDREN'S BUREAU, *supra* note 11, at 2.

have to end the standby guardian's responsibilities until she is ready.¹¹⁶ This allows a newly released mother the time she needs to get back on her feet before resuming full caregiving.¹¹⁷ She does not need to endanger her children by automatically, and therefore prematurely, taking back custody without having a job or money to ensure proper continued care for them.¹¹⁸ And because her parental rights remain intact during this time, she can still see and spend time with her children, without feeling compelled to take them back before it is appropriate to do so.

V. TERMINATING THE STANDBY GUARDIAN: RESPECTING PARENTAL RIGHTS WHILE KEEPING CHILDREN SAFE

Standby guardianship is terminated when the custodial parent files the paperwork with the court revoking the alternate guardian's parental status over the child.¹¹⁹ The question for states may be whether the court should treat this as merely a status change that does not require inquiry or whether the court must look into the released parent's fitness before affirmatively processing the request to return full custody to the parent. If the court allows the parent to choose to terminate the alternate guardian without questioning her authority to make that call, the court is respecting her constitutional right to raise her children how she best sees fit and is maintaining an efficient court process.¹²⁰ But respecting that parental right without verifying that she has suitable means to care for the child post-incarceration may be contrary to the best interests of the child, a compelling state interest sufficient to intrude on a fundamental constitutional right.¹²¹ If the court requires the parent to show financial stability and possession of appropriate housing before permitting

116. *See id.*

117. One important goal for individuals who were formerly incarcerated and wanting to reintegrate after release is to find stable employment. Christy A. Visher et al., *Employment After Prison: A Longitudinal Study of Former Prisoners*, URBAN INST. JUST. POL'Y CTR. 1, 2 (2010).

118. *See* AFTER INCARCERATION, *supra* note 112, at 21.

119. CHILDREN'S BUREAU, *supra* note 11, at 3–4.

120. *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000) (reaffirming the case law establishing that parents have a fundamental liberty interest in the care, custody, and control of their children).

121. Under the strict scrutiny test developed by the U.S. Supreme Court, if the government has a compelling state interest they may infringe on a fundamental right, such as the right to the care, custody, and control of one's child, as long as the means are narrowly tailored. Ronald Steiner, *Compelling State Interest*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest> [<https://perma.cc/D7YY-YTV3>] (discussing the requirements of government action under strict scrutiny).

the parent to terminate the alternate guardianship, then the court acts to protect the child.¹²² However, then the court also takes on the additional burden of acting as social worker and must hold additional proceedings, which may undermine the efficiency of the standby guardianship process.¹²³

While it might appear to states at first glance that children will be left unprotected if the court treats standby guardianship termination as a status change addressed only as a procedural process, there is in fact a way to ensure safeguards with this method.¹²⁴ States merely need to include a notice and objection period for appointment and termination of the standby guardianship to solve the problem.¹²⁵

With a notice and objection period, when a parent appoints the standby guardian at the beginning of the process, objections can be raised if the child himself, or another adult, believes there is a reason the designee should be prevented from becoming the standby guardian.¹²⁶ Similarly, after filing with the court to terminate the guardianship, notice to the standby guardian can be mandatory and creates a time frame during which the standby guardian may respond to this status change.¹²⁷ The notice period allows the standby guardian an opportunity to object to the termination and to offer proof that the parent, while no longer physically unavailable due to incarceration, has nevertheless not returned to an appropriate level of fitness to care for a child.¹²⁸

Allowing the standby guardian, who has been responsible for the well-being of the child, to be the gatekeeper regarding the parent's reacquisition of custody, saves the court from having to hold hearings for every guardianship status change.¹²⁹ Instead of a system where every time a court approves standby guardianship, it knows that later there will have to be additional proceedings to terminate the guardianship, this method allows a court to hold termination-based proceedings only in the event that there is cause for concern regarding the custody of the child.¹³⁰ And on the occasions when the situation becomes contentious between the parent and the standby guardian, family courts are very adept at settling custody disputes

122. See Christian, *supra* note 109, at 9.

123. See U.S. DEP'T HEALTH & HUM. SERV., CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT, AND INTERVENTION 7, <https://www.childwelfare.gov/pubPDFs/neglect.pdf> [<https://perma.cc/N2YZ-MGRM>].

124. See, e.g., *supra* note 45, § 207(e)–(g).

125. See, e.g., *id.*

126. See, e.g., *id.*

127. See, e.g., *id.*

128. See, e.g., *id.*

129. See, e.g., *id.*

130. See, e.g., *supra* note 45, § 207(e)–(g).

between two adults who have concurrent rights to care for children.¹³¹ This procedural notice method does not significantly add to the court's workload, nor does it require the court to act like a social worker actively monitoring the welfare of the child, a role it is not equipped to handle.¹³² The child's interests and upkeep are protected by an invested and responsible adult, and parental rights are not unnecessarily infringed upon.¹³³

This method also benefits social services, who tend to have limited resources and more work than they can get to.¹³⁴ This frees them up to prioritize children in abusive and neglectful homes rather than children of newly released parents who were never previously accused of endangering their children.¹³⁵ Social services may still need to get involved if the standby guardian is unable to provide adequate housing and care for a child, just as they would if any child lived with his parent in unfit conditions.¹³⁶ If that becomes the case, however, social services are responding to child neglect, and not stepping in and taking a child out of his home to place in foster care merely because he has an incarcerated custodial parent.¹³⁷ Social workers may also be required if termination proceedings lead to a conflict that requires an evaluation of parental fitness to regain custody.¹³⁸ However, as a base rule, social workers will not be needed and their time and resources can be allocated elsewhere.¹³⁹

VI. BENEFITS TO THE CHILD

The framework of standby guardianship is designed to balance the parental right of care, custody, and control of a child with the State's interest in the child's welfare.¹⁴⁰ By emphasizing the relationships between the parent, the standby guardian, and the child, care

131. *How Child Custody Decisions Are Made*, *supra* note 101.

132. See U.S. DEP'T OF HEALTH AND HUM. SERV., CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT, AND INTERVENTION 67, <https://www.childwelfare.gov/pubPDFs/neglect.pdf> [<https://perma.cc/N2YZ-MGRM>].

133. See, e.g., *supra* note 45, § 207(e)–(g).

134. See Roxanna Asgarian, *America's child welfare system was already failing. The pandemic could weaken it further.*, VOX (Mar. 26, 2020), <https://www.vox.com/identities/2020/3/26/21194371/coronavirus-child-welfare-system> [<https://perma.cc/BB4D-W77F>].

135. See Hager & Flagg, *supra* note 8.

136. See Christian, *supra* note 109, at 7.

137. See, e.g., CHILD & FAM. SERV. AGENCY, *When Child Welfare Investigates Your Family*, <https://cfsa.dc.gov/page/when-child-welfare-investigates-your-family> [<https://perma.cc/58Z8-NV6G>].

138. See Kathy Minella, *10 Factors Used to Determine if a Parent is Unfit for Custody in 2022*, MINELLA LAW GROUP (Jan. 1, 2022), <https://minellalawgroup.com/blog/10-factors-used-to-determine-if-a-parent-is-unfit-for-custody> [<https://perma.cc/KBM6-WV3H>].

139. See, e.g., *supra* note 45, § 207(e)–(g).

140. See Weimer, *supra* note 17, at 66.

for the child is always prioritized while disruption to everyone's lives is minimized.¹⁴¹ Otherwise, the relationship between the State and the child whom it does not know is the one that controls.¹⁴² When a mother gets to choose the guardian for her child and that guardianship kicks in when she is incarcerated, the overlapping goals of the State and the parent are met: the child is always legally cared for by a trusted adult.¹⁴³

Standby guardianship can mitigate some of the severe trauma that children experience when their parents are incarcerated.¹⁴⁴ Children of incarcerated parents often suffer psychologically from a sense of instability, have difficulty forming healthy attachment relationships, possess a diminished sense of self, and more.¹⁴⁵ Standby guardianship cannot necessarily address the issues of financial instability that many children who have an incarcerated parent are likely to face, even when placed with a known adult.¹⁴⁶ However, children are better able to cope with that instability when they are able to maintain regular contact with their incarcerated parent and when they are placed in homes of adults they already know, which standby guardianship can achieve.¹⁴⁷

A standby guardianship contingency plan means that a child's life is less disrupted in a variety of ways, which lessens the trauma they suffer.¹⁴⁸ Because standby guardianship laws allow a mother to retain her parental rights, and thus continue to maintain a parent-child relationship, she can work to encourage a healthy attachment to the alternate guardian.¹⁴⁹ Additionally, when a parent is able to designate an adult with whom the child already has a relationship, the child does not feel abandoned or neglected; rather, he knows that his mother cared enough to set up a plan just for him.¹⁵⁰ Absent such a provision, he may be placed with strangers through the foster care system.¹⁵¹ At the very least, placement with an individual whom the child knows can lessen the discomfort of having to move to new

141. *See id.*

142. *See id.*

143. *See id.*

144. *See* Allard, *supra* note 65, at 49.

145. *See id.* at 50, 54.

146. ANNIE E. CASEY FOUND., *Children of Incarcerated Parents Fact Sheet*, <https://www.aecf.org/resources/children-of-incarcerated-parents-fact-sheet> [<https://perma.cc/WS48-HC8C>].

147. *See* Christian, *supra* note 109, at 3–4.

148. *See* Allard, *supra* note 65, at 51.

149. *See, e.g.*, Weimer, *supra* note 17, at 65.

150. *See* Allard, *supra* note 65, at 52.

151. *See, e.g.*, Weimer, *supra* note 17, at 82.

surroundings and establish a completely new routine for everything affecting his daily life.¹⁵²

Allowing an incarcerated parent to appoint a standby guardian allows the person who knows the child best to customize guardianship so that it is tailored to meet the needs of each child.¹⁵³ This is more than the State can realistically offer to do for the child, in light of its limited resources and lack of specific knowledge about the child.¹⁵⁴ A parent knows the temperament and unique needs of her child and will presumably appoint someone suited to address those needs.¹⁵⁵ The parent may even take the child's input into consideration, if he is old enough to make viable recommendations.¹⁵⁶ As an example, an older child nearing the end of high school who would prefer to stay in the same school district to complete school could have a suitable guardian appointed who lives in the requisite area, while a younger sibling who would prefer to live with a family member in the neighboring county could have that separately appointed guardian. A parent might also use standby guardianship to ensure that her children are not separated from each other, which could otherwise happen in foster care.¹⁵⁷ In either example, the parent has the necessary perspective to account for what will help her child thrive in a way that the State cannot and does not replicate.¹⁵⁸

CONCLUSION

Standby guardianship laws were a novel concept that emerged to address a crisis of the times: the AIDS epidemic.¹⁵⁹ Today, there

152. Allard, *supra* note 65, at 52.

153. *See, e.g.*, Weimer, *supra* note 17, at 65.

154. Approximately 198,753 children, or 46% of all children in foster care are placed with non-relatives. *See* NAT'L CONF. OF STATE LEGISLATURES, *The Child Welfare Placement Continuum: What's Best for Children?*, Nov. 3, 2019, <https://www.ncsl.org/research/human-services/the-child-welfare-placement-continuum-what-s-best-for-children.aspx> [<https://perma.cc/YMS8-W9YG>]. This category does not include family friends who might be known to the child (because that is classified under kinship care or placement with relatives) and therefore indicates that almost half of children in foster care are placed with total strangers. *Id.*

155. *See, e.g.*, Weimer, *supra* note 17, at 81.

156. The UGPPA and UGCOPAA both include sections that allow for a child's input by allowing the child to object to an adult he finds unfit, ensuring that the child's point of view is accounted for. *Supra* note 45, § 202; *supra* note 45, § 207.

157. *See* Emily Kernan, *Keeping Siblings Together: Past, Present, and Future*, <https://youthlaw.org/publication/keeping-siblings-together-past-present-and-future> [<https://perma.cc/5G7W-4AD8>]. "[A]s many as 75 percent of . . . foster children are placed apart from one or more of their siblings." *Id.*

158. *See* Weimer, *supra* note 17, at 81.

159. *See id.* at 65–66.

is a different crisis that affects children similarly and also needs addressing: rising female incarceration rates.¹⁶⁰ Until the larger systemic change needed to overhaul the mass incarceration problem is tackled, there will continue to be children who are traumatized when their parents suddenly do not come home and they are unexpectedly removed from their familiar environments to be placed in the care of strangers.¹⁶¹

Right now, arrested parents are helpless to plan for their children's welfare even though they can foresee their impending absence.¹⁶² For temporary short-term care, children can stay with a relative or family friend, but if a parent is going to be incarcerated for a significant period of time, it becomes impractical to rely on an informal system of care.¹⁶³ Unless the adults caring for the children in the parent's absence have a means to obtain rights over the children, the State will often intervene to terminate parental rights so that different adults can take responsibility for the children.¹⁶⁴ This current process is a strain on children, parents, and social services.

Both states and parents are interested in protecting children in this situation and ensuring that they are well-cared for physically and emotionally.¹⁶⁵ One way to achieve these goals is to create a legal avenue for family planning that is accessible to incarcerated parents. Permitting incarcerated parents to plan for their children's welfare while they are unable to be there themselves allows for child-specific decision-making that sidesteps the need for social services intervention.¹⁶⁶

Standby guardianship laws are an already established legal framework that currently allows for parents in other situations, namely medical incapacity, to designate alternate guardians if they are unable to handle daily parenting obligations.¹⁶⁷ Expanding states' definitions of qualifying parents who may designate standby guardians is a straightforward way to use the existing laws to ensure proper care for children of incarcerated custodial parents.

States have already shown they are willing to adopt and, over time, amend standby guardianship laws.¹⁶⁸ There is no reason that

160. INCARCERATED WOMEN AND GIRLS, *supra* note 2, at 2.

161. *See* Allard, *supra* note 65, at 51.

162. *See* Weimer, *supra* note 17, at 68.

163. *See* Kennedy et al., *supra* note 4, at 3.

164. *See* Lois M. Davis et al., *The Impact of Incarceration on Families: Key Findings, in UNDERSTANDING THE PUBLIC HEALTH IMPLICATIONS OF PRISONER REENTRY IN CALIFORNIA: STATE-OF-THE-STATE REPORT* 117, 121 (2011).

165. *See* Weimer, *supra* note 17, at 86.

166. *See, e.g., id.* at 80–81.

167. CHILDREN'S BUREAU, *supra* note 11, at 1.

168. *See, e.g., supra* note 50, §§ 13-901 to 13-904; *supra* note 50, § 1726.

this additional expansion, including incarcerated custodial parents under standby guardianship laws, cannot be realized, especially when it matches up with the existing requirements.¹⁶⁹ Incarcerated parents have a foreseeable need for an alternate guardian once they know they are facing a possible prison sentence.¹⁷⁰ Furthermore, the situation has a clear triggering event, when the parent is sentenced to time in prison, that leaves no ambiguity as to when the standby guardianship starts.¹⁷¹

There are any number of reasons that a parent may end up in a situation where she is facing incarceration, but these reasons do not preclude her from being a better choice than the State when it comes to planning for the care of her children.¹⁷² And if the State retains some reservations about relying on the judgment of an incarcerated parent, it does not need to question the appropriateness of the mother's decision as long as it includes a procedural notice period as part of its standby guardianship laws. Including this in the process of petitioning for an alternate guardian ensures that if there is reason for either the child or other adults to feel the requested course of action is unsuitable, objections and other arrangements can be made.¹⁷³ The notice period also similarly protects children from ending up in State care in situations where termination of the standby guardianship, upon a parent's release, may be premature.¹⁷⁴ If the standby guardian considers the newly released parent not yet ready to take care of her children, the standby guardian has the ability to object and continue guardianship while the court evaluates the situation.¹⁷⁵ Children get to stay with familiar adults and the State does not need to worry about their well-being.¹⁷⁶

Standby guardianship is a legal framework that emphasizes keeping families intact.¹⁷⁷ Parents get to keep their parental rights, children's unique needs are addressed because guardianship is decided by someone who knows them well, and state intervention is minimized; the family unit gets to assert itself and therefore reassert its value at a time when it is being strained.¹⁷⁸

169. See Weimer, *supra* note 17, at 69–70.

170. See Allard, *supra* note 65, at 51.

171. *Id.* at 51.

172. See Weimer, *supra* note 17, at 87.

173. See, e.g., *supra* note 45, § 207(e)–(g).

174. See, e.g., *id.*

175. See, e.g., *id.*

176. See, e.g., *id.*

177. See CHILDREN'S BUREAU, *supra* note 11, at 1.

178. See Weimer, *supra* note 17, at 68.

Mass incarceration disrupts the lives of families and children whose well-being and protection are fundamental to American life.¹⁷⁹ States have an obligation to recognize this problem and work toward fixing it fully. In the meantime, however, they can improve the lives of countless families by adopting standby guardianship laws that allow incarcerated custodial parents to appoint standby guardians.

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179. *Mass Incarceration*, AM. CIV. LIBERTIES UNION (2022), <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/PT5M-DKBW>].

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