



The Human Impact of Bypassing Foster Care for At-Risk Children: Building a Continuum of Support for Families Diverted from Foster Care to Avoid Adverse Impacts



ALLIANCE FOR CHILDREN'S RIGHTS & LINCOLN
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PROJECT SUMMARY

In early 2019, the Alliance for Children's Rights and Lincoln partnered to explore the scope of issues created when child welfare professionals bypass juvenile court for children at risk of entering foster care. This occurs when relatives are identified and encouraged to care for the child outside of foster care or to petition for probate court guardianship, resulting in a hidden foster care system.¹ The goal of the project is to develop a set of recommendations and strategies to provide diverted families greater access to information, supports, and services to promote systemic changes to meet families' need. These issues were approached holistically: we endeavored to seek and understand the impacts on children, parents, and caregivers and develop recommendations that account for the needs and rights of everyone.

Over the course of 2019, we conducted a series of focus groups and surveys in order to engage various stakeholders including diverted families, child welfare workers, kinship service providers, minors' and parents' counsel, and social services agency staff across California. In addition, we reviewed literature and studies focused on this population. Our goal is to understand how diversion from the child welfare system occurs and the impact of diversion practices on all involved in the chain: the children and parents, the relatives and non-related extended family who care for the children, and the professionals dedicated to serve the children and families.

Specifically, the focus groups and surveys were intended to solicit the experiences of those impacted by diversion practices and their insights on what improvements could be made to the process to better support children and their caregiver families. Through the focus groups' discussion and survey input, the Alliance and Lincoln gathered information to help service providers and policy makers to address significant impacts in the following areas:

- Supporting Children and Families: Ensuring Available Supports and Resources
- Avoiding Legal Limbo and Safeguarding Children While Promoting Family Choice
- Tracking Our Progress and Moving Towards Holistic Reform

The report summarizes the focus group discussions and survey information and includes selected quotes from participants illustrating the recurring themes. Moreover, the report distills the information from the lived experiences of families and service providers in the hidden foster care system and incorporates recent research and policy analysis in the form of recommendations to better support children and families.

¹ The term "hidden foster care" was coined by Josh Gupta-Kagan in the article *America's Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.10, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437849.

INTRODUCTION

“The father is incarcerated, the mother left and never returned so I filed a missing persons report. I was told if I didn't get guardianship she would go to CPS/Foster Care.”²

“Kinship families are rife with trauma . . . on the part of the child as well as the caregiver. There is something traumatic about having your life changed in a matter of days. Trauma effects are ongoing for the child but supports are not readily available.”

Stable placements with loving caregivers and supports and services that attend to the needs of the child are core to achieving well-being for children in foster care. While foster care is the catch-all term used for children living in out-of-home care from their biological parents, the boundaries of foster care are less clear when kin are involved. Increasingly, child welfare professionals are utilizing formal foster care placements with relatives. Historically, regardless of whether a child was formally placed through the dependency court or instead informally left in the care of a relative, systemic barriers often prevented the kinship families from receiving the financial support and other assistance that they need. Over the last eight years, there has been significant progress in California to ensure that those relatives who take in a child through a formal foster care placement have access to the same funding, supports, and services available to all other foster care placements. As a result of concerted and collective advocacy, led by the Alliance for Children's Rights, relative foster families now receive equal funding, initiated at the time that children enter their care, to help them provide for those children's needs.

“Hidden foster care not only follows CPS agency involvement but is usually specifically requested by CPS authorities. Still, legal custody does not transfer, and certainly does not transfer to the state leaving parents, children, and kinship caregivers without a clear legal status governing the situation insisted upon by the CPS agency.”³

However, this tremendous victory only benefits that subset of relative caregivers who receive formal placement of the child in foster care. Data is essentially non-existent for kinship care outside of formal foster care, creating an opportunity for an inquiry into the opportunities and challenges for these families who are diverted away from the formal foster care system into the hidden foster care system in well-intentioned efforts to “keep kids out of the system.”

² All emphasized blue quotes are from primary research through focus groups, surveys, and interviews.

³ Josh Gupta-Kagan, America's Hidden Foster Care System, 72 Stanford Law Review (forthcoming 2020), p.10.

The Alliance for Children's Rights and Lincoln facilitated 19 focus group discussions with over 200 participants from May-July 2019 and received a total of 326 surveys from those involved in hidden foster care. The focus groups and surveys were conducted to solicit information from caregivers who provided care to children and youth outside the formal child welfare system, youth who were cared for by relatives or non-related extended family members outside the formal child welfare system, and service providers supporting the families and children – including child welfare workers, kinship service providers, minors' and parents' counsel, and social services agency staff. Discussion was designed to gather information from the focus group participants and survey respondents:

- To assess whether families and service providers understand diversion practices;
- To assess whether families understand supports and services available through the formal child welfare system to relative and non-related extended family members;
- To understand the supports and services available and used by hidden foster care caregivers and parents to support the children in their care;
- To understand the financial resources provided to families caring for children in hidden foster care;
- To understand the legal arrangements (if any);
- To understand both benefits and challenges encountered, if any, in caring for children outside the formal child welfare system; and
- To seek suggestions for improvements/changes to support children and families.

Background

"My life changed with a phone call. They said you either pick her up or she's going to Polinsky – Polinsky is for San Diego County child welfare where they place the kid, if they cannot place right away with a relative. It's a shelter care facility."

Find Family to Support Children

When children cannot remain safely in the home of a parent, relatives are looked to first to provide care because connecting a child with a known family member increases child well-being, improves educational outcomes, minimizes trauma, creates stability for the child, and enables children to remain together with siblings.⁴

Federal and state child welfare laws prioritize family or kinship caregivers as the preferred homes for children who can no longer safely live with their parents. Most kinship caregivers are grandparents, aunts, uncles, cousins, siblings, and extended family members who step up in a moment of crisis and accept a child into their home. These caregivers

⁴ Jill Duerr Berrick and Barbara Needell, *Recent Trends in Kinship Care: Public Policy, Payments, and Outcomes for Children, Policies and Practices* (1999).

share similar stories: they were unexpectedly contacted by a child welfare worker and asked to take in a young relative who could no longer safely remain at home. These families have little time to prepare financially, to arrange time off from work, or to prepare their homes for children. They are noticeably lower income than the general population and put their own family stability at risk to take care of children in urgent need.⁵

Typically, they also are unfamiliar with the complicated web of services, agencies, and funding streams that make up the child welfare system. The emotional first hours of an emergency placement are just the beginning of multiple contacts with an extensive bureaucracy. Sometimes the child is placed formally into the caregiver's home through a foster care placement. Other times, the child is informally left in the care of their relative, without the full benefits of foster care.

The decision about whether to formally place a child with a relative through foster care or encourage that relative to take the child in without the involvement of the child welfare system has broad implications for the child, parent, and the caregiver. When a child is placed into foster care with a relative, both the child and parent receive representation by an attorney, reunification services, and case management. As a foster child, the young person gains specific rights such as the right for the child to remain in their school of origin and receive partial credits for work completed at one school in the event that the child does have to transfer to a new school as a result of the placement. In addition, caregivers of children placed through foster care receive funding and other critical services like childcare, respite care, and financial support to transport the child to their school each day.

"My grandson was born to a drug addict mother. Being paternal grandparents, CPS told us the baby was coming home with us. Gave us 24 hours to make our home safe for the baby. Two years later, our granddaughter was born. Same mother. Child was dropped off [by CPS] at our house. They are now eight and 10 years old."

Diverted from Foster Care into Hidden Foster Care

Hidden foster care occurs because of presumptions about the child welfare system, a desire to protect and promote family choice and private decision-making, and/or attempts to increase efficiency for the child welfare agency. Indeed, "both staff and kinship caregivers reported that being involved with the child protective services agency meant adhering to many rules and regulations, which both types of participants considered intrusive and not family-friendly."⁶ There is significant concern over the licensing requirements within the formal foster care system, or the resource family approval

⁵ Gretchen Livingston, *At Grandmother's House We Stay: One-in-Ten Children Are Living with a Grandparent*, Pew Research Center (2013), p. 2.

⁶ *Ibid.*, p. 3.

program (RFA), and its inaccessibility to kin caregivers. “Foster care licensing typically imposes multiple requirements that could disproportionately limit licenses for poor families—such as minimum bedroom space requirements or limits on the total number of people in a home, or criminal background checks.”⁷

In California, these diversions from foster care have no clear statutory basis; California law contemplates that when the state or county removes children from the home of a parent as a result of abuse or neglect, they become wards of the state, with all the rights and protections that entails. Despite these laws, our findings through the surveys and focus groups reveals that many children in California are diverted to care by a relative at the urging of a child welfare worker and without an understanding of the consequences that decision has on their futures. Similarly, federal law offers “no guidelines on when kinship diversion is appropriate, how to assess whether a particular caregiver is appropriate, or what services should be available in kinship diversion arrangements.”⁸

When children are diverted from the system to a relative’s home, the supports, rights, services, and representation provided by the child welfare system are denied to the child, parent, or the caregiver. Diversion away from foster care also means that the child and caregiver do not receive support through the child welfare system, including monthly financial support, education rights, case management, and other supportive services. Beyond access to the services, “[t]he absence of a change in legal custody can also raise questions about kinship caregivers’ authority to make health care, educational, or other decisions for children in kinship caregivers’ home.”⁹

Diversion practices also have grave implications for the parent and child’s right to be reunified and to be together as a family. The separation of a child from a parent is of enormous consequence, and federal and state laws are aimed at ensuring that separation only occurs after reasonable efforts have been made to avoid the separation and through a process that provides the parent and the child due process and the chance to reunify. Gupta-Kagan writes:

The loss of these two critical protections—reasonable efforts to reunify and case planning obligations—is particularly acute when hidden foster care lasts longer than a few days. Then the invasion of family integrity becomes even more severe, and the need for a meaningful plan to resolve the case even more important. When such separations are triggered by real concerns about parents’ ability to raise their children, rehabilitation is crucial to address those concerns. But the CPS agency may perceive the

⁷ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.30.

⁸ Karin Malm and Tiffany Allen, *A Qualitative Research Study of Kinship Diversion Practices*, Child Trends Research Brief (2016), p. 1.

⁹ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.37.

case as lower priority—there is no legal obligation for the state to develop a detailed case plan or provide rehabilitative services, no pending court hearing to prepare for and thus no moment when a judge will question the agency’s efforts to prevent removal or reunify the child, and the agency may perceive the child as stable in the kinship caregiver’s home and thus deprioritize the case compared to others with pressing concerns.¹⁰

Hidden foster care practices also impact child safety. When a child is diverted to a relative’s home, there is no change in legal custody (unless the relative independently seeks guardianship through another court process, such as through probate court). As a result, the parent has the legal right at any time to take the child, thus “when parents are an immediate physical danger to children, hidden foster care provides weak protection.”¹¹

“We settled on guardianship because we were told that the kids could be taken back from us, and the social workers really pushed the issue. Had we known what we do now, we would have left them in the foster system while living with us.”

Shifting Federal Landscape: The Family First Prevention Services Act

In February 2018, the Family First Prevention Services Act (FFPSA) was signed into law which, for the first time, provides states with the option of drawing down federal funding in support of diversion practices. Specifically, FFPSA allows the utilization of federal funds to support children at imminent risk of foster care by developing a prevention plan that “identif[ies] the foster care prevention strategy for the child so that the child may remain safely at home, live temporarily with a kin caregiver until reunification can be safely achieved, or live permanently with a kin caregiver.”¹² “Congress thus explicitly envisioned that these new federal funds would be available to provide services to children and their family members when state action temporarily—or even permanently—changed their custody.”¹³ The mechanics and ramifications of FFPSA remain unclear at this time, but the new law threatens to fuel the practice of hidden foster care.

¹⁰ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.35.

¹¹ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.38.

¹² 42 U.S.C. section 671(4)(A).

¹³ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.51.

FOCUS GROUPS AND SURVEY PARTICIPANT DEMOGRAPHICS & FINDINGS

Focus groups were conducted in California's Bay Area, Central Coast and Central Valley, and in the counties of Los Angeles and San Diego. Five focus groups were conducted for caregivers only, one for service providers only, and 13 included both. Two focus groups were supported by Spanish translators. Participant caregivers care for children placed with them by county social workers and probation officers.

Focus Groups Participants

Caregivers

Caregivers from across the state participated in the focus group discussions including monolingual Spanish speakers. Participants included grandmothers and grandfathers, aunts and sisters, and non-related extended family members. Most participants took the children in their care into their homes to "prevent them from being put into the foster care system." Circumstances ranged from parents unable to care for their children due to incarceration to mental health issues to drug-related issues. The children in their care range from less than a year old to 17 years in age and include single child placements, multiple sibling group placements, and multiple extended family child placements. Legal arrangements were categorized into five categories: informal/no legal arrangement, probate guardianship, voluntary placement agreement (VPA), dependency guardianship, and formal foster care.

Service Providers

Service providers supporting diverted children and families participated in the focus groups including county social workers, public health nurses, kinship service providers, minors' and parents' counsel, independent living program coordinators, and foster family agency staff.

Surveys

Surveys were made available in English and Spanish and responses were collected both electronically and in writing. Surveys were targeted to diverted caregivers and youth, direct service organizations providing support to diverted families, Foster and Kinship Care Education (FKCE) providers, kinship support groups, and foster youth organizations.

Survey Respondents

Surveys were completed and returned by 326 individuals in 22 counties, representing input from across the state.

Summary of Findings

“The worker threatened me that if I didn't take them, they would take them away from me.”

The focus groups and surveys provided key insights into both the reality and perception of those impacted by the hidden foster care system.

Legal Status of Case

Many families were unable to identify whether the child(ren) in their home was there as a result of formal government involvement:

- 24% of caregivers who indicated they were an informal kinship arrangement also indicated they receive foster care benefits, and
- 24% of kinship caregivers who said they had a guardianship through probate court also indicated they received foster care benefits.

Under existing California law, only children placed formally through foster care or a voluntary placement agreement (VPA) are eligible for foster care benefits. Therefore, children who were diverted from foster care or had guardianship established by probate court would not be eligible for foster care benefits. We cannot establish from the survey answers whether the families were actually formal placements or whether the funding stream was misunderstood. It is equally likely that the family was receiving CalWORKs (public assistance cash aid) and characterized it as a foster care benefit or that they were receiving foster care benefits because the placement was actually a formal foster care placement that they characterized as being outside of foster care. This theme was repeated in the comments and discussion in the focus groups.

Additionally, many families were unable to determine whether and how child welfare was involved in their case. For probate guardianships, 69% indicated that they had no child welfare involvement and 18% of respondents with dependency guardianships answered the same, highlighting this misunderstanding.

The responses make it clear that families generally do not have a clear sense of whether the court they appeared before was the probate or dependency court, and when or how child welfare was involved in the case.

“When I hear foster care, I hear stranger care. As opposed to foster care means kinship care. How do we get rid of that belief?”

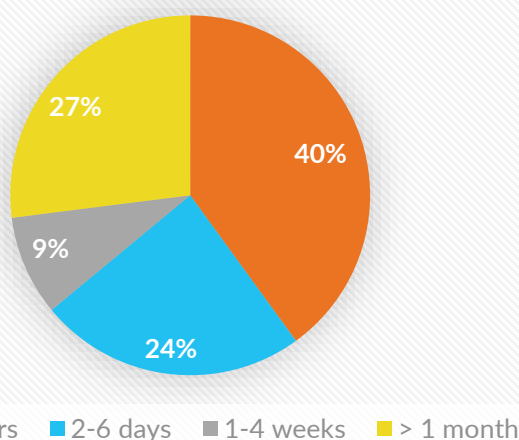
“Fear” of Foster Care and Lack of Information

Many families surveyed and who participated in focus groups were either skeptical or fearful of involvement with the foster care system. Many families who characterized their actions as keeping the child out of foster care also spoke about their dissatisfaction with the resource family approval (RFA) process, the process by which families accepting placement through the foster care system are approved by the placing agency. A service provider noted that “there is a lot of confusion and very little knowledge of what foster care actually is or their role. There is also role confusion about private non-profit versus county child welfare organizations and almost no education provided at the time of placement about the general approval requirements or requirements of how to meet the child's needs.” The survey found that only 26% of service providers felt that diverted kin caregivers are prepared to meet the RFA requirements.

Many families lamented the lack of information available to them at the time they took the children into their care and throughout the time the children remained in their care: specifically, about the implications related to financial support and medical and mental health resources. Additionally, families noted the difficulty in finding supports and information like respite care, education support, caregiver support groups, childcare, and other available resources. This speaks to the need for better information for all families so they can understand the different paths available to them and the services and supports available through each of those mechanisms. This reality for families in hidden foster care was consistently conveyed in the surveys, as 42% of families indicated that they received “no information” about the different types of legal arrangements available to them, and

only 26% received information on “all the legal options available.” Adding to the challenges of information and transparency, 40% of caregivers had less than 24-hours notice of the child being placed in their home, as seen in Figure 1.

Figure 1: Amount of notice to caregivers of placement



“Yes, you’re doing this and in the meantime you’re saving the state all this money. Not only are we not going to help you, it seems to me like you’re going to punish us for this. Because

I rose to the occasion, now you're kicking me. It makes you feel somehow that somebody has done you wrong. It's always in the back of your mind."

Inequities in Kinship Care

Both caregivers and service providers iterated the inequities that exist between formal and hidden foster care on all levels – funding, services, supports, legal rights, treatment by government and agency workers, and more. When asked if the child welfare system values kin and non-kin caregivers equally, 65% of service providers and 64% of caregivers disagreed – showing a majority see a significant inequality. This is of particular concern given that “there appears to be general alignment in the literature to suggest that kin caregivers are, on average, more vulnerable than the average U.S. parent or substitute caregiver, and the children they care for suffer greater vulnerabilities than is typical among U.S. children.”¹⁴

Considering that 92% of service providers indicated that the demand for kinship support services is on the rise, there is a great urgency to meet the needs of the families stepping up to care for vulnerable children in hidden foster care. When asked about the top three greatest threats to stability in their homes, all five identified legal arrangement populations suggested that respite care was a top concern, with access to mental health services following closely behind. While these services are made available in formal foster care (though often difficult to navigate and secure), they are alarmingly inaccessible to those families caring for children in hidden foster care, further exacerbating inequities between these families and placing both children and caregivers at greater risk given the lack of opportunity for readily accessible respite care and mental health services.

HIDDEN FOSTER CARE PERSPECTIVES & RECOMMENDATIONS

Our literature review identified, and the focus group and survey participants confirmed, the often unintended consequences of the hidden foster care system and the necessity and importance of keeping children safe while providing support and services to the children and families. One caregiver noted, “We are not valued by the system. The formal kin caregivers are connected to services and financial support that my community is denied. We have the same responsibility without the financial support. It is most unfair.”

The following recommendations incorporate specific proposals and themes from the focus groups and survey feedback, focused on positive and timely interactions and supports for

¹⁴ Jill Duerr Berrick and Julia Hernandez, *Developing consistent and transparent kinship care policy and practice: State mandated, mediated, and independent care*, 68 Children and Youth Services Review (2016), p. 30.

children, parents, and caregivers as well as streamlined processes. The intention of the recommendations is to ensure that the child, parent, and caregiver's interests, the parties impacted by hidden foster care, are all acknowledged and addressed. In addition, these recommendations are intended to be considered holistically as many require several of the recommendations to be implemented together to address all facets of the issue and to prevent unintended consequences. While several of the recommendations could be enacted in the short-term, ultimately, comprehensive reform would require action on the broader set of recommendations proposed. The recommendations are focused on three areas:

- Supporting Children and Families: Ensuring Available Supports and Resources
- Avoiding Legal Limbo and Safeguarding Children While Promoting Family Choice
- Tracking Progress and Moving Toward Holistic Reform



Figure 2: Roadmap of Draft Recommendations

Supporting Children and Families: Ensuring Available Supports and Resources

"I had to really look hard and find people who could help me, and there was no help out there. And just out of the blue, I was talking to someone and they mentioned Kinship Center and I called. And it saved my life."

"I finally found out about kinship services through a family member who was a social worker on the East Coast. How pathetic is that. This system is really broken. I have spoken to many other kinship caregivers who were never told about kinship services or other help available."

"I did not receive any information about support or options. I am an attorney practicing juvenile law. I have heard that CalWORKs assistance may be available as a non-needy caregiver. I spent over an hour searching the internet to finally get the application. The application seems overwhelming and daunting. Keep in mind, I am an attorney practicing juvenile law and that it took an hour to find the application with me already knowing the name of what I was looking for. I am under the impression the county wants to prevent people from applying for help."

Recommendation #1: Expand kinship navigation services and develop best practice model

Issue: Kinship Support Services Programs and Kinship Navigator Programs offer relatives a range of services including case management, support groups, respite care, information and referrals, mentoring/tutoring, tangible supports, and legal assistance. These programs are often a lifeline for relatives who have taken in a family member unexpectedly and are navigating a complex web of services and supports. However, only 20 counties across California have a kinship support program. Further, since realignment, many of these programs have seen drastic budget cuts. County systems may be fragmented/regionally diverse or available only through calling the county hotline – which may require providing contact information prior to receiving resources information.

Additionally, terminology may be unfamiliar or used inconsistently, for example, family members may not know to search "kin navigator" or what services a kin navigator can provide. The California Department of Social Services (CDSS) website offers limited information on kinship support service programs, and service providers shared that it had not been actively updated since 2013. In an effort to gather more information, the authors frequently called the California Kinship Navigator Program hotline throughout the 11 month research period but the calls all went unanswered.

78% of service provider survey respondents do not think kinship families receive the necessary amount of mental health services to thrive.

Background: As a result of passage of the Family First Prevention Services Act (FFPSA) in 2018, states will soon be able to access federal funding for kinship navigator programs. In order to be eligible for federal funding, any kinship navigator program adopted and funded with federal dollars must be determined to be an evidenced based practice. To date, there

have not been any kinship navigator programs evaluated by the new Prevention Clearinghouse and determined to meet the standard of an evidenced based practice. However, as of October 2019, there are two navigator programs under review by the Prevention Clearinghouse. As soon as a program is determined to meet an evidenced based practice, other states will have the opportunity to modify their existing kinship support programs to have fidelity to the program approved in the Clearinghouse and begin drawing down federal funds for the operation of the program.

Solutions:

- Once a kinship navigator program is approved for inclusion in the Prevention Clearinghouse, work with kinship support programs across the state to conform program models to meet the standards of the evidenced-based practice and leverage additional federal funds for the expansion of kinship support services to all counties. As part of this work, California should simplify and clarify the role of kin navigators by referring consistently to programs as “kinship navigators” and to explain the range of supports and services offered so that kin caregivers can more easily locate and utilize available services.
- Ensure updated and accurate information is made available on state resources (such as websites, brochures, and hotlines) on kinship navigator programs in all counties.
- Make clear, concise, and comprehensive information available at the time of any placement explaining the differences between guardianships granted through different courts, placement options, and the funding and services that are associated with each option and ensure that county welfare workers provide this information to all caregivers.
- Desist in requiring provision of contact information when calling information hotlines and other community resources to prevent dissuading caregivers from accessing resources.
- Work with state and national accreditation organizations, such as the Council on Accreditation (COA), to align the best practice model of kinship navigator programs with their existing Standards for Family Foster Care and Kinship Care Services.

“Please make it to where DCFS [Department of Children and Family Services] social workers are to not tell family members, who volunteer to take on such a huge responsibility with these children, to go to probate court instead of doing their job and opening up a case for the child's welfare. It is extremely hard to raise someone else's child/children, that has suffered tremendous trauma, on public assistance. If you are trying to help keep these kids from turning into violence as they get older and or end up being part of the juvenile justice system, please I'm begging you, to help stop these social workers from turning away family members who are able to care for these kids with the help from outside resources such as foster care.”

"I would have liked to get information from anyone who would give it to me. I would have liked to know what my rights were, what to do. When I had my own child, I was prepared. But with my grandchild, I had no information or preparation. I didn't know what to do or not to do."

"I wish everyone would receive a manual. And in that manual for it {sic} to have support groups, regional centers, mental health services, educational services, the whole range of what it takes in order to feel like you're not psychologically incarcerated."

Recommendation #2: Ensure fully-informed decision-making by providing information about the differences in resources and requirements of probate guardianship and the foster care system

Background: Relatives and extended family members often take placement of children without prior notice or during times of trauma and may be pressured by caseworkers to pursue probate guardianship in lieu of opening a child welfare case. In addition, relatives may pursue probate guardianship without knowledge or understanding of other options available. Probate court personnel may be unaware of the significant differences in resources and requirements available to kin caregivers and the children in their care.

Issue: Lacking adequate and timely information about the differences in resources and requirements of probate guardianship and the foster care system results in uninformed

Caregiver survey respondents who had sought probate guardianship were the least informed of all groups, and had the greatest negative sentiment related to financial supports for kinship families.

decision-making which has significant financial implications for the kin caregiver and the child, including access to extended foster care educational support to pursue higher education goals.

Solution:

- Provide clear and concise information at the time of placement and in other forums on the differences in supports and services between probate guardianship and the foster care system to help ensure decisions are fully informed.
- Develop an information brochure to be provided to caregivers requesting probate guardianships on the differences between probate guardianship and the child welfare system including supports and services and RFA and other requirements.

"At a Child and Family Team meeting prior to removal, I brought up the possibility of a voluntary placement agreement but was told the county doesn't really practice that. The emergency worker and her supervisor decided to detain."

“Sometimes families need help but don’t want to ask for it because they are afraid their kids will be taken away. So, if there were some way for families to do voluntary plans on their own somehow – we {the families} don’t want to do guardianship or have my kids taken away. I know my daughter needs help with drug issues, but they could opt to receive services.”

Recommendation #3: Increase use of Voluntary Placement Agreements (i.e. clarify that safety plans are not allowed for placements outside the home subject to the child welfare investigation and that counties can utilize Voluntary Placement Agreements in order to facilitate temporary placements outside of the home and into a relative/extended family member’s home)

Issue: In California, many counties facilitate the movement of a child to a relative’s home without any documentation or they use variations of a “safety plan,” which is not authorized by statute and does not provide any protections to the parent or child, funding to support the child, or result in a transfer of legal custody and control to the child welfare agency or the caregiver. Because safety plans are not time limited, children can remain in a relative’s home indefinitely without ever establishing legal permanency and without ever determining whether the initial removal from the home was appropriate or providing the child and parent the opportunity to reunify. Safety plans trigger a change in the physical custody of the child without any of the protections of the child welfare system to ensure that change in custody was appropriate, that the child who experienced the abuse and neglect is appropriately provided for through funding and services, and that the ongoing legal permanency of the child is accounted for. Further, “when investigators give parents an ultimatum – sign this plan, or I will remove your child – it should trigger due process protections. Unfortunately, current case law says otherwise.”¹⁵

Background: When children are removed from a parent outside of the foster care system, the child and parent are deprived of significant due process protections and the caregiver is deprived of monthly financial support and services to address the child’s experiences of trauma. In addition, hidden foster care leaves caregivers without the ability to make educational and health care decisions for the child and deprives the child of important educational rights afforded in foster care.

One of the primary arguments in favor of hidden foster care for kin is that “families should retain responsibility and be empowered to drive the planning and decision making”

¹⁵ Ryan C. F. Shellady, *Martinis, Manhattans, and Maltreatment Investigations: When Safety Plans Are a False Choice and What Procedural Protections Parents Are Due*, 104 Iowa Law Review (2019), p. 1613.

because it is the family that is “best able to keep the child safe.”¹⁶ “This supposed voluntariness exempts hidden foster care from both court oversight and federal data tracking requirements.”¹⁷ However, in practice, it appears diversion is often coerced and families are often not aware of the different options available to them. Further, federal and state child welfare law already provide an option for a voluntary agreement between a child welfare agency and a parent in order to allow the parent to work towards reunification without having a formal petition filed with the dependency court. Voluntary Placement Agreements (VPAs) must be voluntary, are time-limited, can be terminated at any time by the parent, and offer the parent and child services aimed at reunification while the child is cared for in the home of a relative or family friend.¹⁸ VPAs protect the due process interests of the parent and child, because they are limited in time, can be withdrawn or terminated by the parent at any time, and require the agency to take additional formal action if the child cannot be returned home within 180 days. They also protect the caregiver because custody is transferred to the caregiver, allowing them to make decisions on behalf of the child. Further, children in a VPA receive the rights associated with being in foster care, such as the right to remain in their school of origin, and these children are supported through a monthly foster care stipend.

Caregiver survey respondents who had sought VPAs experienced the highest involvement of biological parents in the placement decision and had the highest positive sentiment regarding access to mental health services.

In California, a VPA is the only legal option a child welfare agency has to facilitate an out-of-home placement outside of a petition filed with the juvenile court:

An out-of-home placement of a minor without adjudication by the juvenile court may occur only when all the following conditions exist: (1) there is a mutual decision between the child's parent, Indian custodian, or guardian and the child welfare department in accordance with regulations promulgated by the State Department of Social Services; (2) There is a written agreement between the county welfare department and the parent or guardian specifying the terms of the voluntary placement. The State Department of Social Services shall develop a form for voluntary placement agreements that shall be used by all counties.¹⁹

Because there are only two legal ways for a county child welfare agency to separate a child from a parent in California, through a petition filed in the juvenile court or through a

¹⁶ Karin Malm, Kristin Sepulveda, and Sam Abbott, *Variations in the use of kinship diversion among child welfare agencies: Early Answers to Important Questions*, Child Trends (2019), p. 2.

¹⁷ Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.7.

¹⁸ 42 U.S.C. section 672(e) – (g); CA Welf. & Inst. Code sections 16507.4, 16507.5, and 16507.6.

¹⁹ CA Welf. & Inst. Code section 16507.4(b).

VPA, counties are opening themselves up to increased liability through the use of unsanctioned alternatives to the VPA. Safety plans or actions to move a child to a relative without any official and documented action means that the child welfare agency likely remains liable “because the state role in arranging hidden foster care placements could be viewed as a state-created danger; if a kinship placement in hidden foster care creates a danger for the child, the state created the danger by arranging the placement.”²⁰

Solutions:

- Any alternative agreement (including so-called “safety plans” or “voluntary family agreements”) utilized by a county is deemed to be a Voluntary Placement Agreement and the parent, child, and caregiver are afforded the same legal rights, responsibilities, and protections as is contained in the state’s VPA policy and form (including the right to receive funding, to terminate the agreement at any time, and to require the child welfare agency to take additional action within specified time frames)
-- OR --
- Permit parents or children to seek court review of any safety plan or informal care arrangement that did not utilize the state-sanctioned VPA form either at the time the safety plan or informal care arrangement is initiated or at any time thereafter. “Providing a mechanism for parents to challenge a safety plan in court without triggering an abuse or neglect petition or removal would provide a more meaningful check on CPS agency authority while respecting the occasional benefits of safety plans. Parents should be able to insist on a court hearing to review a safety plan under the same standards that govern pre-adjudication removals.”²¹

Avoiding Legal Limbo and Safeguarding Children While Promoting Family Choice

“Even though three misdemeanor child abuse charges were filed, somehow DCFS was not involved.”

“Other cases where they call CWS [child welfare services] and then the judge will say that CWS said there’s no problem and they didn’t open a case so there must not be a problem. Judges sometimes assume child welfare involvement means one thing or another, when CWS didn’t intend for that meaning. So, it isn’t always that CWS intended for that meaning and there isn’t communication between the court and the child welfare system. Both sides are assuming something is happening.”

²⁰ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.40.

²¹ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.61.

“Even though juvenile court is scary – it’s built to protect child’s rights and parent’s rights and the perception of the community is not that. It is that it is a scary system and that the focus is on taking families away. Probate, like family court, is not equipped to handle the needs of the family and children. With probate, the challenge is that they are not working towards reunification with the children’s parents and there are situations where they can benefit from services and they have a right to reunify with their parents. And if they are going to reunify, then the caregivers are left without the financial support to be able to give these kids the childhood they deserve.”

Recommendation #4: Increase authority of the probate court and family court to require the filing of a dependency petition

Issue: Currently, probate courts in California are not required to refer cases that involve allegations of parental unfitness or child abuse or neglect to the child welfare system for investigation.

Background: Under existing law, when a relative files a petition for the appointment of a guardian of a minor in probate court, a court investigator is required to make an investigation as well as file a report and recommendation with the court, unless waived by the court. If the investigation finds that any party to the proposed guardianship alleges the minor's parent is unfit, the probate court can, but is not required, to refer the case to the social services agency designated to investigate potential dependencies.²²

Solution:

- Require the probate court to refer cases involving allegations of parental unfitness or that involve the abuse or neglect of the minor to the county social services agency designated to investigate potential dependencies.
- Provide annual training to probate judges, child welfare professionals, and juvenile court judges on the obligation to refer cases that involve allegations of parental unfitness or abuse and neglect to child welfare for investigation.

“I don’t think there is anyone more scared of child welfare than a parent – it’s the removal of a child. Goes back to the lack of control. The unknowns. The secrecy. But there are reasons for that secrecy because of protections of these children. But these parents really

²² Prob.Code, § 1513, subd. (b); *Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 603–604, 124 Cal.Rptr.3d 642 (Christian G.) (held that Probate Court has a mandatory duty to refer to Child Protective Services under 1513(c) but the law was subsequently amended the following year making it permissive for the Probate Court to refer the matter to the child welfare agency).

lose in their ability to reunify with their children. At least with child welfare and the juvenile court, they have a chance at being parents.”

“In my opinion, until the Department drops the foster parent versus the kinship family mentality, the kinship families will continue to be marginalized in this system.”

Recommendation #5: Provide the child and parent legal representation at the point a child is determined to be a “candidate for foster care”

Issue: In California, children and parents are not provided representation until the child welfare agency files a petition with the dependency court to formally remove the child from the parent’s home. However, the child welfare agency is often involved with the child and parent for weeks or months prior to the petition being filed. And, when a relative is identified, the agency often coerces the parent and relative to accept the removal of the child without the advice of counsel, adequate information about the child and parent’s options, or the ramifications of that decision. Gupta-Kagan asserts:

Crucially, the legal obligation to help parents reunify with their children is triggered by placing children in foster care—thus agencies avoid it by using hidden foster care. Agencies must also make reasonable efforts to prevent the need to remove children from their parents, but that obligation is only adjudicated if the agency brings the case to court, which an agency relying on hidden foster care need not do. As at least one CPS agency has acknowledged explicitly, using hidden foster care means the agency ‘has no further legal obligation to the parent in terms of reunification.’²³

Background: A child is considered a “candidate for foster care” when they are at “serious risk of removal” and the State child welfare agency is “either pursuing his/her removal from the home or making reasonable efforts to prevent such removal.”²⁴ “A child may not be considered a candidate for foster care solely because the State agency is involved with the child and his/her family. In order for the child to be considered a candidate for foster care, the State agency’s involvement with the child and family must be for the specific purpose of either removing the child from the home or satisfying the reasonable efforts requirement with regard to preventing removal.”²⁵ At the point a child is considered a “candidate for foster care”, the state may claim federal funding to offset the administrative

²³ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.35.

²⁴ Child Welfare Policy Manual, Section 8.1D (Question 2).

²⁵ Child Welfare Policy Manual, Section 8.1D (Question 2).

costs associated with the case, including the cost of providing the child and parent with independent legal representation.²⁶

The vast majority of children who are moved to a relative's home through involvement by the State child welfare agency meet the threshold of being a "candidate for foster care." In these cases, the State agency has completed an investigation and determined that the child cannot remain safely at home with a parent and facilitated the movement of the child to a relative's home through either a formal process (e.g. Voluntary Placement Agreement or a safety plan) or simply by contacting the relative and telling them to take the children and pursue a probate guardianship. These cases are already beyond the threshold of being at "serious risk of removal" since the children are physically moved away from the parent and into the home of a relative. Independent legal representation of children and parents in these circumstances would ensure that parents have a full and adequate opportunity to receive services and reunify with their child and that the child has a path to return home or, if that is not an option, that the child's legal status is fully accounted for in the relative's home.

Solution:

- Provide legal representation to the child and parent at the point a child is determined to be a "candidate for foster care," which would include any time the probate court invokes section 1513(b) and refers the case over to child welfare for an investigation. High quality parent representation in child welfare cases has been shown to reduce the length of time in foster care without impacting child safety or maltreatment rates and also to hasten permanency for children in foster care.²⁷ And, as a matter of due process, action by the state to facilitate a change of the child's physical custody "should trigger a right of parents to obtain legal counsel (appointed if necessary) to advise them of their rights and negotiate appropriate plans with CPS agencies."²⁸ Without representation, "[s]tate agencies infringe on parents' and children's fundamental right to family integrity with few meaningful due process checks."²⁹
- Children and parents could be assigned representation at the point they are asked to sign a VPA or a safety plan.

"My overall experience with the caseworkers is that once the child is placed, their job is done, and they are non-responsive to your needs and concerns."

²⁶ Child Welfare Policy Manual, Section 8.1B (Question 31).

²⁷ Lucas A. Gerbera, Yuk C. Panga, Timothy Rossa, Martin Guggenheim, Peter J. Pecorac, Joel Miller, *Effects of an interdisciplinary approach to parental representation in child welfare*, 102 Child and Youth Services Review (2019) 42-55.

²⁸ Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.6.

²⁹ Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.1.

“There is a great disparity between kinship families that are not involved in the juvenile dependency system and those that are. These families do not have access to Kin-Gap, wrap around services, respite services that are fully paid for, and other supports that are offered to those families involved in the juvenile dependency system.”

Recommendation #6: Require the juvenile court to independently review the decision by child welfare not to file a dependency petition and allow the juvenile court to assess imminent risk based on the circumstances of the child if they were to be in the home of the parent

Issue: Juvenile courts are not required to independently review the decision of a social worker not to file a dependency petition following an investigation required as a result of the probate court referring the case to child welfare. Further, even when the juvenile court exercises its discretion to independently review the decision, the juvenile court is limited in its authority to adjudicate a child under section 300 or to require the dependency petition to be filed once a child has already been moved into a relative’s home, because there is no longer an imminent risk of harm to the child. The result is that many families are left in legal limbo. If the probate court refuses to order the guardianship because the child and parent would benefit from reunification services and an attorney, the probate court can deny the guardianship petition. However, these children are often unable to get before the juvenile court, where they would be provided reunification services and the benefit of representation by an attorney, because there is no longer an imminent risk of harm to the child because the child is already living with the relative who does not pose a threat to the child. It’s a catch-22 that the law does not resolve.

Background: If the probate court refers a case to the social services agency, California Welfare and Institutions Code section 329 directs the social worker to immediately investigate the referral as he or she deems necessary to determine whether proceedings in the juvenile court should be commenced. If the local child welfare agency determines that the case does not fall within section 300 (California law that determines whether a child is abused, abandoned, or neglected) or, perhaps more likely, that the case does fall under section 300 but that there is no longer any imminent threat of harm to the child because the child is now residing with a relative, the child welfare agency is not required to initiate a dependency proceeding.

The juvenile court has discretion, but not the obligation, to review the social worker’s decision not to file a petition. Even when the juvenile court exercises its discretion to review the social worker’s decision, the juvenile court is limited in its independent review of the case. According to the California Court of Appeal, the juvenile court must determine two things in its independent review in order to compel the finding of a petition. First, the juvenile court must determine that the child falls within section 300. If the child does fall under section 300, the juvenile court must further find that a dependency petition is

required to protect the child.³⁰ The problem is that at the point a relative is seeking a probate court guardianship, the child has already been moved away from the parent, resulting in caseworkers arguing the child is no longer at risk of harm. The appellate court seemingly agreed with this reasoning, finding that it was an abuse of the juvenile court's discretion to order a dependency petition filed "if the guardian is a *suitable custodian and able to protect the child from the risks posed by the parent's* behavior" (even though the juvenile court's reason for requiring the petition to be filed was because the juvenile court had mechanisms to help the parent reunify and the parent did not have access to court-appointed legal counsel in probate court).

The end result is that caregivers who accept temporary placement of a child in hidden foster care at the urging of a child welfare worker may not have any recourse to ensure the parent and child can receive appropriate services and supports through the child welfare system. Further, these families can be left in legal limbo because the probate court can deny the guardianship, finding that the guardianship is not in the best interest of the child because the child would benefit from reunification services and representation through juvenile court. The juvenile court can then refuse to adjudicate the child a dependent, finding the child is no longer at imminent risk because they have been moved away from the parent.

Solution:

- Require the juvenile court to independently review the decision any time a social worker determines not to file a petition after an investigation pursuant to Probate Code section 1513(b) (and the parent(s) and child(ren) should have counsel at this point, if we can assign counsel at the point children are determined candidates for foster care).
- In the juvenile court's independent review of the social worker's decision not to file a dependency petition, the court must determine (1) whether the child comes within the parameters of section 300 and would be at imminent risk of harm if the child were living in the home of the parent when the child lived in the home of the parent within the last twelve months; (2) whether the child welfare agency facilitated the removal of the child to the kinship caregiver's home within the last twelve months; and (3) whether the parent wishes to attempt to reunify with their child (assuming that the parent is represented by counsel in making that determination).
 - If the court determines that the child falls within section 300 and that the child welfare agency facilitated the movement of the child from the parent's home to a relative's home and either the parent(s) desire to reunify with their child, that is a sufficient basis for ordering a dependency petition to be filed with the court. In order to ensure that the juvenile court can take jurisdiction, amend section 300 to define imminent risk of harm to be evaluated based

³⁰ In re Kaylee H., 205 Cal.App.4th 92 (2012).

on the circumstances of the child if the child is living with or were to be returned to the home of the parent to account for those cases when the child welfare agency has facilitated the movement of the child out of the parent's home through some variation of a safety plan.

- If the court determines the child falls within section 300 but the parent and caregiver both agree that they desire guardianship and the parents do not desire to reunification, then the court can order a guardianship pursuant to Welfare and Institutions Code 360(a) (see below).

"The kinship families feel that the children are left in their care in order to close a referral and avoid court proceedings, however, with lack of regard for the resources that the caregivers will require to turn their lives inside out and make a safe place for children to adjust to a new life and heal their trauma."

"Four children were placed through DCFS and I eventually received guardianship. The first two children were placed through probate court, they were neglected, and I contacted DCFS and a social worker told me to take them to probate court (being that I was naïve about how the system worked back in 2004) I did, and it was the worst mistake. I have been having trouble with services and resources for those two children ever since, the only services I qualified for were public assistance which is known as CalWORKs and CalFresh. The other four children of whom was {sic} placed years later were through DCFS and the wealth of services/resources that were available to those four children really helped them as time passed."

Recommendation #7: Increase use of 360(a) guardianships

Issue: California law allows for juvenile courts to order guardianship in lieu of ordering a child into a foster care placement, protecting parental choice and family integrity for those parents who do not wish to receive reunification services and want an alternative plan for their child. However, these types of guardianships are not widely utilized. Instead, relatives are encouraged to seek guardianship in probate court, despite the fact that the probate court is not equipped to adjudicate cases involving child abuse and neglect and the Probate Code specifically requires probate courts to refer any case that had CPS involvement alleging that a parent is unfit to the juvenile court.³¹ Courts have interpreted this requirement to mean that family members do not "have the right to pursue a different judicial path [i.e., probate court] to guardianship of an abused or neglected child than would be pursued if the abuse or neglect came to the county's attention...they must cross the bridge into juvenile court."³²

³¹ CA Probate Code section 1513.

³² *Guardianship of Christian G.* CA Probate Code section 1513.

Background: California law includes a mechanism by which a juvenile court can find that a child comes within section 300 but not order the child into foster care, as long as the parent is not interested in family maintenance or family reunification services.³³ This provision of law overcomes the argument that allowing counties to divert families to probate court is necessary to preserve family integrity and decision-making about where their children should live. If the parent does not object to the guardianship, there is no reason to refer the caregiver to the probate court because the juvenile court can order the guardianship without adjudicating the child a dependent. Conversely, if the parent does object to the guardianship, it is a violation of the parent and child's due process rights for a child welfare agency to refer a case to probate court and avoid the protections of the child welfare system.

Given that juvenile courts have the authority to order guardianships in lieu of dependency and given that juvenile court judges are trained in child welfare law and are thus better able to assess the facts of the case and engage the parent to ensure they truly understand their rights, guardianships in lieu of a dependency case should go through the juvenile court and not the probate court.

Solution³⁴:

- If following the juvenile court's review the court determines that the child falls within section 300 and that the child welfare agency facilitated the movement of the child from the parent's home to a relative's home within the last twelve months but the parent(s) do not desire to reunify and consent to the guardianship, the court can order a guardianship pursuant to Welfare and Institutions Code 360(a).

"I actually lost my house supporting him at first because I was afraid that if I asked for money for childcare when working that they would take him away."

"Nothing except Medi-Cal for the first three years. We did not know we were eligible. It was very hard. We felt very isolated as we were not seniors and did not know about the

³³ "Notwithstanding any other provision of law, if the court finds that the child is a person described by Section 300 and the parent has advised the court that the parent is not interested in family maintenance or family reunification services, it may, in addition to or in lieu of adjudicating the child a dependent child of the court, order a legal guardianship, appoint a legal guardian, and issue letters of guardianship, if the court determines that a guardianship is in the best interest of the child, provided the parent and the child agree to the guardianship, unless the child's age or physical, emotional, or mental condition prevents the child's meaningful response. The court shall advise the parent and the child that no reunification services will be provided as a result of the establishment of a guardianship. The proceeding for the appointment of a guardian shall be in the juvenile court. CA Welf. & Inst. Code section 360(a)."

³⁴ The solutions for recommendation #6 and #7 are the same because the end result is that cases that involve abuse and neglect are properly adjudicated by the juvenile court and the probate courts should be relieved of the responsibility of deciding matters that involve fundamental rights of parents in cases involving abuse and child separation. Further, matters that go through juvenile court can be appropriately connected to the supports and services available through the child welfare system.

programs just beginning to be put into place. It seems that, at least 10 years ago, the outreach was to seniors or caregivers already in the system in some way.”

“There are not enough funds to help us with kids going back to school. It’s expensive to feed, clothe them for school. We need more funds in general. I wish CalWORKs would increase their funds to kinship families.”

Recommendation #8: Fund all guardianships ordered pursuant to Welfare and Institutions Code section 360(a)

Issue: Not every guardianship that is ordered through the juvenile court is eligible to receive subsidized guardianship funding through either the Kinship Guardianship Assistance Payment Program (Kin-GAP) or through the AFDC-FC (foster care benefits) program. Specifically, those individuals who are granted a guardianship pursuant to Welfare and Institutions Code section 360(a), which occurs when the parent consents to the guardianship and does not desire reunification or family maintenance services, are ineligible for support unless the child was previously living with the relative for six consecutive months through a Voluntary Placement Agreement (VPA).³⁵

Background: A 360(a) guardianship permits a child who has experienced abuse and neglect and has been found to come within section 300 to avoid coming into foster care if the parent is not interested in family maintenance or reunification, agrees to the guardianship, and the guardianship is found to be in the child’s best interest. In these circumstances, it is unusual for the 360(a) guardianship to be preceded by six months of a Voluntary Placement Agreement. And yet, only those children who spend six months in a VPA with the relative can receive subsidized guardianship funding once the 360(a) guardianship is ordered.

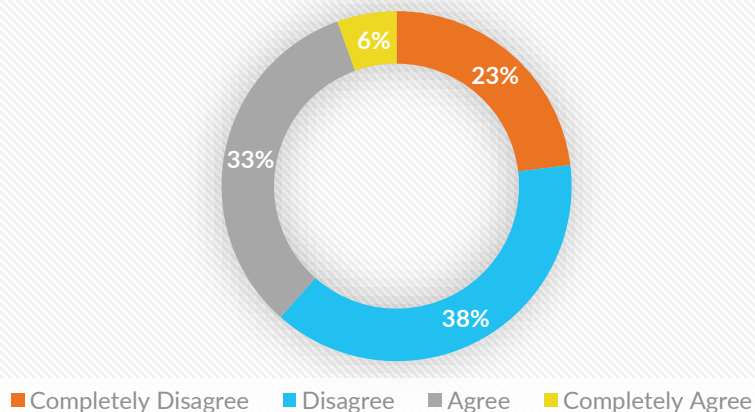
80% of service provider survey respondents do not think kinship families receive the necessary level of financial support to thrive.

The purpose of the state-funded Kin-GAP program is to “enhance family preservation and stability” for children when there is “no need for continued governmental intervention in the family life through ongoing, scheduled court and social

³⁵ “On and after the date that the director executes a declaration pursuant to Section 11217, if the court appoints an approved relative caregiver as the child’s legal guardian, the child has been in the care of that approved relative for a period of six consecutive months under a voluntary placement agreement, and the child otherwise meets the conditions for federal financial participation, the child shall be eligible for aid under the Kin-GAP Program as provided in Article 4.7 (commencing with Section 11385) of Chapter 2. The non-federally eligible child placed with an approved relative caregiver who is appointed as the child’s legal guardian shall be eligible for aid under the state-funded Kin-GAP Program, as provided for in Article 4.5 (commencing with Section 11360) of Chapter 2.” CA Welf. & Inst. Code section 360(a).

services supervision of the placement.³⁶ The state-funded Kin-GAP program was maintained even after federal funding became available to offset the cost of subsidized guardianships because the state recognized that there would be children who would need the support of the subsidized guardianship program who would not be eligible for federal reimbursement. The requirement that a child has to be living in the home of a relative through a foster care placement or a VPA for six consecutive months comes from federal law.³⁷ The presumption under the federal law is that children are separated from a parent through either a VPA or a petition filed with the juvenile court.³⁸ In California, juvenile courts are permitted to order guardianship in lieu of adjudicating the child a dependent of the court, as long as the parent has consented to that arrangement. Given that these children are otherwise identical to the group of children who are provided Kin-GAP support (i.e. they were found to have been abused and neglected, they are being separated from a parent, legal permanency is established, and the goal is to enhance family stability), they should be eligible for funding through the Kin-GAP program. Failure to comply with the federal rules would mean that we could not claim federal reimbursement for those guardianships. However, California has a state-only Kin-GAP program in order to provide subsidized guardianship funding for those families that do not qualify for the federal Kin-GAP program.

Figure 3: The current structure of support and benefits available for kin caregivers reflect the national priority and practice to place a child with a relative.



³⁶ CA Welfare and Institutions Code section 11361.

³⁷ 42 U.S.C section 672(d)(3).

³⁸ As a result of FFPSA, states seemingly have an additional mechanism to separate a child from a parent by utilizing a “prevention plan” and avoiding a foster care placement; although, these children would not have access to federal subsidized guardianship benefits, as federal law still requires a child to be separated through a VPA or a petition with the juvenile court before they can access guardianship payments.

Solution:

- Amend section 360(a) to allow for the provision of state-only Kin-GAP benefits to any child who has a guardianship established under section 360(a), regardless of the amount of time the child was residing in the relative's home or whether a VPA was in place prior to the establishment of the guardianship.
- In order be able to claim federal funds for the subsidized guardianship payment, amend section 360(a) to allow the juvenile court to order a VPA in lieu of a guardianship in situations where the parent does not wish to receive reunification services and consents to the placement of the child with the relative. After six months in a VPA, the juvenile court can order the guardianship pursuant to section 360(a) and federal reimbursement for the subsidized guardianship payment would be available.

“. . . many of the caregivers I work with would not pass RFA due to prior criminal convictions, CPS history, or simply not meeting the space requirements for children. The uncertainty about whether a caregiver would pass RFA has also convinced many caregivers to not seek assistance through CPS.”

“After three years of going to court attempting to get them placement in my home from foster care, the judge finally allowed them to be placed in my home.”

Recommendation #9: Continue child welfare reforms to ensure that kinship caregivers can be fully licensed and approved within the foster care system

Issue: For a child to be placed into a relative's home through a formal foster care placement, the home must be approved as a resource family. Although children can be immediately placed with a family member through an emergency placement, and the RFA process initiated after the placement, emergency placements are not always allowed, particularly if a county worker believes that the individual might not meet RFA standards. Although there is flexibility in law to allow social worker discretion to place into a relative's home (i.e. using criminal exemption waivers) and utilize alternative mechanisms for approving that home (i.e. child specific approval), in practice, this flexibility is not utilized consistently across the state. Barriers to immediately connecting children to their relatives and to approving relatives as foster placements only increases the incentives to divert children away from foster care.

Background: RFA is intended to be a family-friendly and child-centered caregiver approval process that eliminates duplication of existing processes to approve families. However, in practice, RFA has created bureaucratic hurdles to connecting children to relatives in a timely manner, supporting those relatives through the approval process, and completing approval in a timely and efficient manner. In addition, because the RFA process requires a

more extensive family evaluation that allows the family to be approved as both a foster and adoptive home at the point of approval, many counties are interpreting approval standards in a manner that results in relatives being denied, even though there are exceptions in law and policy to ensure that relatives can be approved to care for their kin. Relatives who could gain approval to care for a child through the formal foster care system under the Adoption and Safe Families Act (the federal law that sets forth the basic health and safety standards a home must meet to be able to receive federal funding) are now being denied as resource families. Because RFA increases the burden on families to gain approval and has resulted in many families being screened out and denied approval, the incentive to divert children away from foster care (and, in turn, deprive them of their basic due process rights, ability to reunify, and critical services and supports) is heightened.

Caregiver survey respondents with formal foster placements received the most training and had the highest positive sentiment about financial supports out of the five arrangement groups.

Solution:

- Improve RFA processes to ensure that kin families can complete RFA:
 - Clarify that a relative may be approved through child specific approval if the relative meets health and safety requirements and placement with that relative is in the best interest of the child.
 - Create an appeal system to ensure a relative who is denied placement of a family member can expeditiously appeal that denial.
 - Create a rebuttal presumption in the law that if the relative was considered a safe home for the child in hidden foster care then that relative can be approved to care for the same child through a formal foster care placement (counties would have to provide clear and convincing evidence of a relative's inability to be approved as a formal foster care placement that would not have otherwise disqualified them for caring for that child outside of formal foster care).
- Streamline emergency placement procedures to ensure that children can be connected to a known family member within 24 hours of being separated from a parent.
- Increase training of RFA workers and county welfare workers across the state to improve understanding of the options to approve a relative's home available in RFA and the intent of such options to ensure children can remain connected to family and community.

Tracking Progress and Moving Toward Holistic Reform

“There is a woefully inadequate system of getting necessary information on services available and resources to kinship families. This is particularly glaring in the area of the education system. This is particularly disturbing as so many of the children in kinship care have special needs and mental health challenges, some of which become permanent in the absence of early intervention. I speak from first-hand experience.”

“I think the system often treats kinship like second hand citizens and is blind to the additional complications the families must endure.”

Recommendation #10: Enhanced data collection

Issue: California does not track the number of cases that are diverted away from foster care. “Such data reporting is important everywhere, and especially in states using flexible federal funding pursuant to the Family First Act, lest removals via safety plans become a way for states to use federal dollars to prevent foster care without preventing children’s removals.”³⁹ Further, “states interested in the well-being of vulnerable children would be well advised to develop mechanisms that, at a minimum, track the incidence of children served by state mediated programs to better understand patterns of family care that include state involvement.”⁴⁰

Background: The precise number of children diverted to a relative’s home through the urging of the child welfare system is unknown, further mystifying the scope of hidden foster care. Additionally, no one knows what happens with these children and families once the diversion has occurred. When a child enters foster care, counties collect data on the number of placement changes, the time it takes to achieve reunification or legal permanency, health and educational outcomes, how many of those youth are placed together with their siblings, and placement stability over time. There is no similar data gathered on behalf of those children diverted to a relative’s home. And, without access to supports and services to address the trauma that alerted the child welfare system to the child and family in the first instance, there is continued risk to the family. However, there is no data kept determining how many of these youth end up coming into foster care at some point in the future due to a failure to meet the needs of the child and caregiver. Nor do we have information on how many of these youth end up homeless or involved in other

³⁹ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.63.

⁴⁰ Jill Duerr Berrick and Julia Hernandez, *Developing consistent and transparent kinship care policy and practice: State mandated, mediated, and independent care*, 68 Children and Youth Services Review (2016), p. 31.

systems, like the juvenile justice system. Child safety is also not tracked, and it is unknown how many of these children achieve legal permanency or return to unsafe environments .

Solution:

- Collect targeted data, as California has one of the best data networks in the country and tracks the experiences and outcomes of youth in foster care. California should expand its data network to “track the number of cases in which [county] actions lead to parent-child separations without formal foster care, and what happens to affected children and their families.”⁴¹
- Implement tracking mechanisms in the probate court system specifically, as most hidden foster care cases are presented there, and expand it to include the dependency and family courts as well.

Data that should be tracked includes:

- Children moved to a relative via a voluntary placement agreement;
- Children moved to a relative through other child welfare involvement;
- Entry into foster care within six months, 12 months, 18 months, and 24 months following a voluntary placement agreement, and
- Entry into foster care within six months, 12 months, 18 months, and 24 months following a safety plan.
- Reunification following voluntary placement agreement.

“I believe that juvenile court should have jurisdiction whenever there is a child that isn’t being cared for by the parent. Period.”

“One court that dealt with all children – my perfect world.”

Recommendation #11: Create a children’s court to unify probate, family, and dependency courts and concentrate children’s advocacy issues into a single court

Issue: Some families experience “legal limbo” when a child’s case is suspended between a dependency court and a probate court without either taking jurisdiction as allegations are investigated or placement is contested. *Kaylee H.*, along with the 2012 amendments to Probate Code section 1513 and Welfare and Institutions Code section 329 (AB 1757; Stats. 2012, ch. 638), have eroded *Guardianship of Christian G.*’s determination that family members do not “have the right to pursue a different judicial path [i.e., probate court] to guardianship of an abused or neglected child than would be pursued if the abuse or neglect came to the county’s attention...they must cross the bridge into juvenile court.”

⁴¹ Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 Stanford Law Review (forthcoming 2020), p.6.

Background: Juvenile dependency cases are the jurisdiction of the dependency court – the court tasked with focusing on the special needs of children and families. The dependency court has the authority to take a minor from the parents for the child’s well-being and safety. The probate court can only grant a probate guardianship if the child is not involved in a family court or juvenile court action.

A 2008 report by the Judicial Council of California notes that “cases involving families and children are some of the most complex and sensitive matter that courts hear” and that unification can provide “increased levels of public trust and confidence in the courts,” “increased service coordination and referrals,” “greater court-community collaboration,” and “more informed judicial decision making.”⁴²

Solution:

- Create a children’s court to replace probate, family, and dependency courts to concentrate children’s advocacy issues in a single court thereby taking advantage of the expertise of all court-related personnel, including judges, minors’ and parents’ counsel, and caseworkers. This would avoid unintentional legal limbo, ensure the due process rights of the child and parent are accounted for, and provide children and families access to the full panoply of services, funding, case management, and general support available through the child welfare system.

CONCLUSION

The complexity of the child welfare system is evident in the myriad of circumstances that lead to children being placed in kinship care, and this report aims to demystify the practice of diversion from foster care and the scope of hidden foster care. This is a work in progress to weave together the lived experience of those in the hidden foster care system in California with the limited data available and the firsthand insights of impacted families and child welfare experts to provide clarity and transparency to the existing network of supports and services.

Moving into the second year of this partnership, the overarching goal continues to be a child-centered system, where each child receives services, funding, and support commensurate with their needs. To achieve this goal, we will build on our learning about the practice and impacts of hidden foster care, and we will work to create policies, practices, and institutional cultures that give kinship caregivers the best opportunity to provide stable, loving homes, parents the necessary assistance to work towards

⁴² Judicial Council of California/Administrative Office of the Courts, *Unified Courts for Families: Improving Coordination of Cases Involving Families and Children* (2008), available online at <https://www.courts.ca.gov/documents/ImprovingCoordination.pdf>.

reunification when possible, and children being raised by relatives the services, funding, and support to meet their individual needs.

California is well-positioned to meet the individualized needs and circumstances of children, parents, and caregivers to provide an accessible, equitable, and positive foster care system for all.

DRAFT - FOR DISCUSSION

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