

[Hidden Foster Care: Guidance for Preventative Legal Advocacy Servicesⁱ](#)

[Introduction:](#)

This pamphlet focuses on “hidden” or “shadow” foster care – a large yet often overlooked component of the U.S. family regulation system. While there are no official statistics, some scholars estimate that hidden foster care impacts roughly a quarter of a million children each year.ⁱⁱ

As an overview, hidden foster care occurs when child protective services (CPS) agencies alter a child’s physical custody without (1) initiating court action; (2) placing the child in the agency’s legal custody; or (3) informing the federal government of the child’s removal.ⁱⁱⁱ

In your role as Preventative Legal Advocacy (PLA) services, you most likely have and will continue to confront situations implicating hidden foster care, even in ways that may not be apparent at first glance.

Here you will find answers to the following questions you and your colleagues may have:

1. What is hidden foster care?
2. What are the problems with hidden foster care?
3. How may PLA organizations be asked to represent different individuals involved in hidden foster care and how can PLA organizations ensure they fulfill their mission of working to preserve families?

[What is hidden foster care?](#)

Generally. Hidden foster care refers to when child protective agencies facilitate removing children from their parents and placing them with kinship caregivers without involving the court. As a result, these children are not technically in formal foster care as there is no court approval of the placement, the agency does not have legal custody, and there is no funding provided to the caregivers. Further, since there is no judicial oversight, the removals take place without the guarantees of due process that courts have adopted to protect the fundamental rights that parents have over the care of their children.^{iv} Additionally, in most states, agency removal of a child will guarantee the parents access to legal counsel. However, since removals are hidden from the courts, parents do not generally have legal representation when their children are removed through hidden foster care, but there are some recent efforts to remedy this.^v

Voluntariness or Coercion? Unlike in the formal foster care system, rather than present findings to a judge, in hidden foster care, a caseworker will often persuade parents to send their children to live with someone they know through an informal arrangement.^{vi} This persuasion can include threats towards the parents.^{vii} There is an inherent power imbalance when caseworkers suggest hidden foster care because the caseworkers effectively have the power to remove children from parents without the parents’ consent. Depending on the state, caseworkers can either remove the children themselves, call the police to remove the children, or trigger a court process that will lead to removal. Caseworkers often either implicitly or explicitly threaten to take parents to court to remove their children and potentially place them with a stranger if parents do not agree to someone else having physical custody of their children.^{viii} At first brush, parents unfamiliar with the system can understandably find this “option” much worse than an informal arrangement.

Examples. Hidden foster care occurs when child protective agencies ask one or both parents to leave the family home during the course of an investigation, or when the agencies ask a parent to send their child to stay with someone else during or after an investigation. Again, agencies contrast this option with the threat of getting a court order to potentially take a seemingly more invasive measure. There are also more institutionalized forms of hidden foster care, such as the “Host Homes” model, which has garnered increasing attention in recent years.^{ix} Safe Families for Children, a faith based national organization, popularized the model in which parents can voluntarily send their children to live with another family while they face a temporary hardship.^x However, if child protective agencies are telling a family to use this model, it may no longer be voluntary and parents may be making a decision they are pressured into.

Child Protective Services’ Position. Some child protective agencies claim these kinds of actions are legal and present an attractive alternative to state intervention that allows vulnerable children to remain in the care of relatives or other loved ones.^{xi} However, when these informal arrangements take place, there are no checks and balances to ensure the family separation is necessary, the government is not required to monitor or ensure placement safety and the relatives or family friends with whom the child is placed do not receive funds or other support to help raise them.^{xii} For clarification, these placements constitute one form of *private* kinship care and should not be confused with “kinship foster care,” which is the formal kinship placement process in court.^{xiii} Currently, there are no federal laws governing the hidden foster care system.^{xiv}

[What are the problems with hidden foster care?](#)

Generally. The problems with hidden foster care manifest in a variety of ways. Generally, if a child is exposed to hidden foster care, they are separated from their parents, like they are in formal foster care.^{xv} Also like the formal foster system, hidden foster care can trigger a long-term, if not permanent, change in custody.^{xvi} These major invasions into parents’ and children’s right to family integrity occur through pressure, if not coercion by CPS agencies of families.

Another one of the major problems with hidden foster care is that informal foster parents are frequently left without money necessary to care for the child. This is because they are not formal foster parents and do not receive formal foster care funds.

Examples.

Lack of Due Process. When parents are coerced into hidden foster care due to threats from child protective agencies, they do not receive the due process protections that courts have adopted to protect the fundamental constitutional right that parents have over the care, custody, and control of their children.^{xvii} When child protective agencies want to remove a child from a parent’s custody, courts require the state to prove that a parent has abused or neglected the child, that the abuse or neglect presents an imminent threat to the child’s safety, and that the removal is necessary to protect the child.^{xviii} Through hidden foster care, children are removed from parents without any finding that the parents have abused or neglected their children. Instead, the child protective agency is enabled to remove children through threats alone, even when a court may find that there has been no abuse or neglect.

Even more concerning is when child protective agencies utilize hidden foster care in cases where they know they have insufficient evidence to prove abuse or neglect in court. In one county, social workers

testified to using hidden foster care most often in these exact scenarios, leading to multi-million dollar verdicts and settlements against Cherokee County, North Carolina.^{xix}

Safety Plan Lengths. Hidden foster care often results in long family separations, especially when safety plans are in effect for too long, often even longer than CPS agency policies allow. For instance, under South Carolina agency policy, safety plans must be completed within 90 days, however, there are some cases in which the state child protective agency enforced them for longer.^{xx}

Supervision Guidelines. Unclear state agency supervision guidelines also facilitate hidden foster care. States have a variety of policies regarding when state supervision should continue once a case has been resolved. There are also varying and murky policies concerning state supervision when children are placed with kin informally, which is one of the most common forms of hidden foster care.^{xxi}

Formal System Interface Ends Abruptly. This is when a family's involvement with the system ends too early, meaning the children are placed with kin without the official check-ins required in the formal foster care system. In fourteen states, the responsible agency does open an ongoing case automatically to provide supervision, however, in most states, if the family regulation agency deems a child's informal foster care placement safe, they will not monitor the case.^{xxii} This means children are relocated without a court order and then often left in kinship custody without any change in legal status. This prevents the child from taking advantage of a variety of services, resources and supports that exist to aid foster children.

Additionally, lack of agency involvement as a result of hidden foster care means there are no reunification services for parents. When the state formally removes children from their parents, the law presumes that the eventual reunification of the family is in the best interests of the children. When children are placed in formal foster care, agencies have a duty to make reasonable efforts to help the family reunify. For instance, if a child is removed due to concerns related to a parent's substance abuse, the state must help connect the parent to appropriate services. However, hidden foster care allows agencies to avoid making reasonable efforts, or any efforts, to help families reunify.^{xxiii}

Reduced Funding for Informal Foster Parents. In the aggregate, kinship caregivers are more likely to be poor than foster parents who are strangers, yet foster care subsidies tend to be more generous than the public benefits that would be available to kinship caretakers in hidden foster care. For example, in Kentucky, most kinship caregivers are grandparents and they often have to dip into their retirement savings or benefits to compensate for lack of government aid.^{xxiv}

Lack of Information. Finally, many parents and informal kinship guardians make decisions without being properly informed about their consequences. One think tank concluded there is no uniform practice governing how to provide these families with necessary information and that these families do not "obtain consistent and comprehensive information" about the options they have. Significantly, this same study also found that child protective services workers "infrequently" tell family members that the formal foster care system would include financial assistance that informal arrangements do not.^{xxv} This leads family members to make uninformed decisions that significantly impact their families.

In addition, it is difficult to know exactly how many children are in hidden foster care, because the federal Children's Bureau does not require states to measure and report it. Recently, a 2021 letter from a coalition of advocates urges the federal Children's Bureau to require that states start tracking it.^{xxvi}

[What should PLA organizations do when asked to represent different individuals involved in hidden foster care?](#)

As you decide whether to take a case or not, PLA organizations should consider whether your advocacy will be furthering hidden foster care. The best thing you can do is provide legal representation to parents facing possible hidden foster care situations. This helps to prevent some of the due process violations that are present in hidden foster care. Representation of parents will help provide parents with the due process rights that they have been deprived of when child protective agencies coerce parents into giving up physical custody of their children. For instance, if an agency removed a child into hidden foster care due to concerns of neglect, representation of the parent will raise the likelihood that parents are advised about their options and can make informed and voluntary decisions. Legal representation can empower parents to refuse state efforts to make them give up their children, so the state has to back off or actually prove that the parent has neglected their child, and that the neglect presents an imminent threat to the child's safety.

Of course, being in a position to represent parents may be challenging when the kinship caregiver is referred as a potential client. In the meantime, you can pay attention to the signs of hidden foster care and do your best not to help facilitate it. Hidden foster care can present itself in a multitude of ways, but guidance for two common scenarios is described below.

Hypothetical #1: The child protective agency asks your organization to represent Silvia in gaining custody or guardianship of her granddaughter Hannah. Until recently, Hannah was living with her mother, Jane, who still has legal custody over Hannah. Jane lives a few towns over from Silvia, and the agency says that Jane agreed to let Silvia have custody of Hannah via a safety plan.

- **Red alert!** This is a potential hidden foster care situation. The agency appears to have facilitated a parent-child separation – the very thing PLA organizations try to prevent – and is asking the PLA organization to help formalize that separation. There is no indication that a court has determined that this separation is necessary. At this point, you should tread carefully. Though this situation was pitched to you as something that Jane is supporting, it is important to ensure that Jane was not coerced into giving up physical custody of Hannah and that Jane was provided thorough information to guide her decision. Since Silvia is not a client, you can explore whether Jane wants an attorney and whether you can represent her. Representing Silvia in this situation without exploring whether Jane wants an attorney puts you at a huge risk of facilitating hidden foster care.
 - Consistent with PLA organizations' commitment to preventing family separations, your top priority should be identifying whether a change in custody is truly necessary and exploring alternatives to that change in custody.
- Check your organization's memorandum of understanding with the child protective agency
 - The MOU should allow your organization to represent parents in these cases
 - Further, your organization should have the power to refrain from taking on a new client that would require advocating for hidden foster care or otherwise facilitating family separations.
- Ensure longevity – make sure the agreed upon result doesn't leave anyone in limbo
 - For example, if Silvia needs financial support to care for Hannah for an extended period, she should be counseled on all of her options, including becoming a licensed foster parent (although this would require involving the agency and going to court which always entails risk), and obtaining public benefits available separate from the foster system (even though those are less generous).

Hypothetical #2: Alison has been caring for her nephew Mason since his birth but does not have legal custody over him. She is now trying to enroll him in kindergarten but a school district official states she isn't able to do so without custody and she has not had contact with Mason's mother in three years.

- A key distinction between this scenario and the above is that the kinship caregiver's relationship with the child has existed for some time and your organization can help facilitate maintaining this family without breaking up an existing family
- As long as the agency did not facilitate Alison's caregiving role, this arrangement is not hidden foster care
- This example illustrates one risk of not resolving legal custody when a child's living arrangement changes, however, it can also mean allowing the parent time to return to the child's life
- Solutions here will likely depend on your state and local law but could include:
 - advocating with the school district to enroll the child without legal custody (and many school districts have policies for doing so)
 - filing for temporary custody or guardianship, temporary guardianship
 - locating the parent and exploring if they would sign a custodial power of attorney (see example in DC Code section 21-2301),
 - or other steps to achieve the client's goals available in your jurisdiction

Want to know more? Here are further resources where you can learn more about hidden foster care:

1. [United Family Advocates](#);
2. [Alliance for Children's Rights](#);
3. [DC KinCare Alliance](#)

For more information on preventative legal advocacy, reach out to Emilie T. Cook via email at emilie.taylor.cook@emory.edu.

ⁱ This guidance was drafted by Grace Bendik, Ainslie Martin, Sabrina Rodriguez, and Ethan Singer of the Columbia Law School Family Defense Clinic, in consultation with Emilie Cook, April 2023.

ⁱⁱ [Pro Publica, "They Took Us Away From Each Other": Lost Inside America's Shadow Foster System \(2021\)](#)

ⁱⁱⁱ [Gupta-Kagan, America's Hidden Foster Care System \(2020\)](#), pg. 848

^{iv} [Gupta-Kagan \(2020\)](#), pg. 860

^v For one example, see e.g. NM LEGIS 90 (2023), 2023 New Mexico Laws Ch. 90 (S.B. 31)

^{vi} [Pro Publica \(2020\)](#)

^{vii} [Gupta-Kagan \(2020\)](#), pg. 848

^{viii} [Gupta-Kagan \(2020\)](#), pg. 848

^{ix} [The Imprint, Lawsuit Alleges New York Created 'Extremely Harmful' Shadow Foster Care System \(2022\)](#)

^x [Safe Families for Children, How Safe Families Works](#)

^{xi} [The Imprint \(2022\)](#)

^{xii} [Pro Publica \(2021\)](#)

^{xiii} [Gupta-Kagan \(2020\)](#), pg. 850

^{xiv} [Pro Publica \(2021\)](#)

^{xv} [Gupta-Kagan \(2020\)](#), pg. 854

^{xvi} [Gupta-Kagan \(2020\)](#), pg. 854

^{xvii} [Gupta-Kagan \(2020\)](#), pg. 860

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- xviii [Gupta-Kagan \(2020\)](#), pg. 860
- xix [Pro Publica \(2021\)](#)
- xx [Gupta-Kagan \(2020\)](#), pg. 854
- xxi [Allen, DeVooght, & Geen, State Kinship Care Policies for Children that Come to the Attention of Child Welfare Agencies \(2008\)](#) , pg. 13
- xxii [Allen, DeVooght, & Geen \(2008\)](#), pg. 15
- xxiii [Gupta-Kagan \(2020\)](#), pg. 877–79
- xxiv [The Imprint, Kentucky’s Budget Shrunk. These Informal Foster Parents Were Left with Nothing \(2021\)](#)
- xxv [Malm & Allen, A Qualitative Research Study of Kinship Diversion Practices \(2016\)](#)
- xxvi [United Family Advocates April 2021 Letter to Children’s Bureau Commissioner Aysha Schomburg \(2021\)](#)