



# The Human Impact of Bypassing Foster Care for At-Risk Children:

Building a Continuum of Support for Families Diverted



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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.<sup>1</sup> 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 members who care for the children, and the professionals dedicated to serving 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 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 Toward 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.

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<sup>1</sup> 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](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 person report. I was told if I didn't get guardianship she would go to CPS/Foster Care."<sup>2</sup>

"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."

"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."<sup>3</sup>

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. Although the term "kinship caregiver" is used generically, there are different subgroups of kinship families. In general, kinship caregivers fall into one of four categories: (1) **private kinship care**: the child came to live with the relative without any current or past involvement by the child protective system (sometimes these relatives establish guardianship through a probate or family court, other times they do not); (2) **diverted kinship care**: the child came to live with the relative through involvement of the child protective system but a dependency case was not opened (i.e., the care, custody and control of the child remains vested with the parent unless the relative established guardianship through the probate or family court); (3) **unlicensed kinship foster care**: the child is placed with relative as a result of involvement with the child protective system, but the relative is not licensed or

<sup>2</sup> All quotes emphasized are from primary research through focus groups, surveys, and interviews.

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

approved as a foster parent; (4) **licensed kinship foster care**: the child is placed with relative as a result of involvement with the child protective system and the relative is licensed or approved as a foster placement.<sup>4</sup> For the purposes of this report and recommendations, we are focused on those children who are involved with the child protective system. In other words, our focus is on those children that came to the attention of the child welfare agency and the child welfare agency facilitated the movement of the child into the relative's home. This includes those children in diverted kinship care as well as licensed kinship foster care (notably, California does not allow unlicensed kinship foster care).

Increasingly in California, child welfare professionals are recognizing the importance of formal foster care placements with relatives. However, this change in practice and culture is occurring against a backdrop of decades of child welfare policies and practice during which kinship foster families were treated differently – and often separate from – the formal child welfare system, regardless of whether the child was placed formally into a relative's home or diverted to that relative's home by the child protective agency with no further involvement by the child welfare system.

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 needed. 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.

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.”

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 additional 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.

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<sup>4</sup> Matthew D. Bramlett, Ph.D., Laura F. Radel, MPP and Kirby Chow, Ph.D., *Health and Well-Being of Children in Kinship Care: Findings from the National Survey of Children in Nonparental Care*, *Child Welfare*. 2017: 95(3): 41 – 60; Laura Alison Caliendo, *State Law and Child Welfare Policy Role in Nonparental Family Composition*, Dissertation Submitted in Partial Fulfillment of Requirement for Doctor of Philosophy – Public Affairs, School of Public Policy and Leadership, Greenspun College of Urban Affairs, University of Nevada, Las Vegas (May 2019).

## 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

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 who cannot remain safely in the home of their parent. For this reason, relatives are the preferred setting for a child who cannot remain in the home of a parent.<sup>5</sup> When a child welfare agency determines that a child 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.<sup>6</sup>

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 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.<sup>7</sup>

Typically, they also are unfamiliar with the complicated web of services, agencies, and funding streams that make up the foster care system or the dearth of services and supports available to families that take in children outside of foster care. The emotional first hours after a relative is contacted by a child protection agency 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.

**“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

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. Diversion away from foster care, or hidden foster care, occurs because of presumptions about foster care, a desire to protect and promote family choice and private decision-making, and/or attempts to increase efficiency for the foster care system. 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.”<sup>8</sup> For example, there is significant concern over the licensing requirements within the formal foster care system, or

<sup>5</sup> 42 U.S.C § 671(a)(19); Calif. Welf. & Inst. Code §§ 361.3, 16000(a); Calif. Family Code § 7950.

<sup>6</sup> Jill Duerr Berrick and Barbara Needell, *Recent Trends in Kinship Care: Public Policy, Payments, and Outcomes for Children, Policies and Practices* (1999).

<sup>7</sup> Gretchen Livingston, *At Grandmother’s House We Stay: One-in-Ten Children Are Living with a Grandparent*, Pew Research Center (2013), p. 2.

<sup>8</sup> *Ibid.*, p. 3.

the resource family approval 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.”<sup>9</sup>

In California, diversions away 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 allegations of abuse or neglect, they become wards of the state, with all the rights and protections that entails.<sup>10</sup> 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.”<sup>11</sup>

When children are diverted from the system to a relative’s home, the supports, rights, services, and representation provided through foster care 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.”<sup>12</sup>

The discrepancies in financial support alone are significant: a child placed with a relative in foster care in California in 2020 receives a minimum of \$1,000 in monthly assistance and that amount can be increased to provide for the specialized needs of the child or to support a parenting youth. By comparison, the maximum amount of financial support available to support a child in informal kinship care is \$606 per month through the CalWORKs grant. Further, for those relatives who take in sibling groups, the CalWORKs payment decreases with each child. For example, three siblings placed together in foster care with a relative would receive a minimum of \$3,000 per month in financial support. Those same siblings who are diverted to a relative’s home would receive a total of \$983 through CalWORKs (less than the monthly support for a single child in foster care), and there is no additional funding available to support youth with specialized needs unless the child qualifies for Supplemental Security Income (SSI).

The disparities in funding is just one of many differences in supports and services available to children placed formally through foster care as compared to those diverted away from foster care into a relative’s home. 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. In addition, caregivers can receive other critical supports like child care, respite, and funding to reimburse the cost of transporting the child to their school of origin each day.

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<sup>9</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.30.

<sup>10</sup> *Welf. and Inst. Code §16507.4(b)*

<sup>11</sup> Karin Malm and Tiffany Allen, *A Qualitative Research Study of Kinship Diversion Practices*, *Child Trends Research Brief* (2016), p. 1.

<sup>12</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.37.

	INFORMAL KINSHIP CARE (Probate Guardianship)	FOSTER CARE PLACEMENT WITH RELATIVE (dependency court)
<b>Funding for Caregivers?</b>	<b>Limited funding</b> available to support kin caregiver – for most families, only CalWORKs	<b>Full foster care funding</b> – in CA this includes access to specialized care, clothing allowance, infant supplements, etc.
<b>Who receives services?</b>	No requirement for services to be provided or to assign counsel to parent or child. No eligibility for respite, emergency child care funding, training, etc.	<b>Reunification services</b> and legal representation for parent. Child receives legal representation and case management services. Caregiver can receive respite, emergency child care bridge funding, and training
<b>Duration of services?</b>	N/A	Reunification services while child is in foster care + federal law permits <b>up to 15 months post-reunification services</b>
<b>Reunification options and funding for permanency?</b>	No reunification services and <b>opportunity for reunification is limited. No funding:</b> Relatives who get guardianship outside of juvenile court are <b>not</b> eligible for Kin-GAP	Child is either reunified or can remain with relative through <b>adoption, guardianship, or as a fit and willing relative and receive continued funding for kin families (AAP, KinGAP, or continued foster care funding)</b>
<b>Supports for TAY?</b>	<b>No eligibility</b> to receive extended foster care, independent living services, or Education and Training Vouchers	<b>Eligible</b> to receive extended foster care (if in care at age 18) independent living skill services (if in care at age 14) or Education and Training Vouchers (if either in care at 16 or adopted/guardianship at 14 or older)
<b>Education rights to promote school stability?</b>	No right to school of origin placements or funding, immediate enrollment, partial credits, etc.	Child has the right to attend their <b>school of origin</b> , the ability to <b>utilize partial credit</b> and immediate enrollment laws, <b>funding for transportation to SOO</b>

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 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.<sup>13</sup>

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."<sup>14</sup>

**"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."**

## **Impacts of Hidden Foster Care on Special Populations: Native American Children and Youth Involved in the Juvenile Justice System**

The ways in which hidden foster care occurs varies for certain populations and the policy implications for these groups deserve special consideration. Specifically, Indian children, youth involved in the juvenile justice system, and expectant and parenting youth have unique needs and rights that are impacted through the practice of hidden foster care, as described below.

### ***Indian Children***

The Indian Child Welfare Act (ICWA) was enacted in 1978 in response to large numbers of Indian children being separated from their parents, extended families, and communities by state child welfare and private adoption agencies.<sup>15</sup> Research found that 25% - 35% of all Indian children were being removed, with 85% of those children being placed outside of their families and communities—even when fit and willing relatives were available.<sup>16</sup>

According to the 2017 California ICWA Compliance Task Force Report, "voluntary" safety plans are used in California counties to circumvent the minimum federal standards of ICWA, thereby eliminating the very protections in place to ensure the required active efforts to provide culturally appropriate services are provided to prevent the break-up of the Indian family or to reunify the family where removal is required.<sup>17</sup> Importantly, these safety plans, while voluntary in name only, do not allow a parent to have the right of return of the child upon demand, in violation of ICWA.

Guardianship proceedings are often a component or requirement of a safety plan, used in lieu of taking the child into foster care. This has the result of shifting the requirements of ICWA from the county social worker and juvenile court to the guardian and probate court, meaning the guardian is responsible for providing active efforts. However, in reality, very few guardians have the resources necessary for these services to be meaningful. The other minimum federal standards required are simply lost in most guardianship proceeding, namely producing a qualified expert witness, producing evidence to meet the evidentiary standards, and

<sup>13</sup> Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.35.

<sup>14</sup> Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.51.

<sup>15</sup> H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531

<sup>16</sup> *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs (1974) 93rd Cong., 2d Sess. 3* (statement of William Byler) (<http://narf.org/icwa/federal/lh/hear040874/>, last visited May 15, 2012).

<sup>17</sup> *California ICWA Compliance Task Force, Report to the California Attorney General's Bureau of Children's Justice, 2017.*

ensuring the notice requirements are met. Further, probate courts are not well versed in ICWA or the state law requirements often failing to provide notice, court appointed attorneys and understanding the requirements of ICWA.

The law is clear when a parent of an Indian child or Indian custodian voluntarily consents to a foster care placement, such consent “shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail, and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.”<sup>18</sup> This consent may be withdrawn at any time and “upon such withdrawal, the child shall be returned to the parent or Indian custodian.”<sup>19</sup>

The remedial intentions of ICWA are effectively negated by these unlawful practices. This results in what may be unwarranted removals of Indian children and an associated deprivation of the protections of the federal laws in place to prevent these very situations.

### ***Youth Involved in the Juvenile Justice System***

Though the majority of youth in foster care are dependents in the child welfare system, some youth obtain foster care status through the delinquency system. This includes youth who are determined to be victims of abuse and neglect who cannot remain safely at home, or be returned home, after that youth has committed a crime or status offense. Other times, these young people start as dependents in the child welfare system and cross over into the delinquency system, sometimes referred to as “crossover youth.” When a child involved in the juvenile delinquency system cannot return to the home of a parent, but also does not require ongoing detention, the juvenile delinquency court can order another “suitable placement” for the child.<sup>20</sup> These suitable placements are considered foster care placements and probation youth in foster care placements have the same rights as all foster youth.<sup>21</sup>

However, while the juvenile delinquency court has the authority to make a placement order, they often do not make this order and instead “release” the child to the relative utilizing what is often referred to as a Home of Parent Order.<sup>22</sup> The impact of a release to a relative through a Home of Parent Order is that care, custody, and control are not transferred from the probation officer for placement with a relative, leaving relatives without the ability to make health or educational decisions for the child.<sup>23</sup> In addition, these children are not considered in a foster care placement and are denied the funding, services and supports that probation youth who have a suitable placement order receive.

The practice of **releasing** children to a relative rather than **placing** with a relative occurs for a number of reasons: probation agencies are less familiar with Resource Family Approval (RFA) – the formal approval process for foster caregivers – and, in many cases, the process to complete RFA is determined to be too cumbersome, resulting in children being released to a caretaker who has no legal requirement to care for them nor the resources often needed to create a stable living environment. Further, when a probation agency decides to move forward with a suitable placement, they often detain the youth unnecessarily while working to approve the home rather than using their authority to do an emergency placement prior to resource family approval. This results in youth experiencing lengthy and harmful periods of detention, often exacerbating their trauma.

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<sup>18</sup> 25 U.S.C. § 1913.

<sup>19</sup> 25 U.S.C. § 1913.

<sup>20</sup> Welf. and Inst. Code § 727(a)(3)-(4).

<sup>21</sup> See California Department of Justice, *Information Bulletin: Probation Officer Obligations for Probation Youth in Foster Care (December 2016)*, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/bcj/ib-2016-04-probation.pdf>.

<sup>22</sup> Welf. and Inst. Code § 772(a)(3).

<sup>23</sup> Welf. and Inst. Code § 772(a)(3).

## ***Expectant and Parenting Youth***

Parenting teens and young adults involved in the child welfare system due to their own history of being victims are particularly at risk for losing custody of their children without due process and an opportunity to reunify. It is common for the child welfare social worker, probation officer or the young person's extended family to encourage the youth to allow a relative to care for their baby while they are living in a foster care placement, finishing high school, receiving other services as part of their child welfare case or completing terms of probation. For some young parents, the "encouragement" takes the form of coercion or an ultimatum: "Give your baby to your aunt/grandmother/other parent's parent or a petition will be filed." In these situations, there is typically no allegation of abuse or neglect. The parent's status as a foster child or ward and possibly the restrictions of their placement may be the only basis for the intervention.

Sadly, what often happens is the young parent agrees to what they believe to be an informal caregiving arrangement only to realize a guardianship has been granted in probate court. The youth who has completed the terms of their probation, is released from juvenile hall, obtains housing or achieves whatever other personal goals had been set out at the time they agreed to the informal caregiving arrangement then attempts to retrieve their child. The young parent must now, without an attorney, meet the extremely high burden of establishing that it would be detrimental to the baby to stay with the now guardian.

In addition to the obvious challenges for any parent to meet this burden, the young parent – who may have had a juvenile justice case or may suffer from effects of trauma caused by abuse or neglect – is even further disadvantaged when they appear in and are judged by a court who lacks experience in trauma and child abuse or neglect. The result is a parent who has done nothing wrong is re-victimized by the court system when they lose custody of their child only because they were themselves a child in need of services or supervision.

## **Shifting Political Landscape: Changes to Federal and State Law**

In January 2017, California introduced a new approval process, known as Resource Family Approval, that combined elements of the prior foster care licensing system, relative approval process, and approvals for adoption or guardianships.<sup>24</sup> The changes in standards were most dramatic for relatives seeking to care for children through a formal foster care placement, requiring relatives to complete pre-approval training and an extensive family evaluation. In addition, families are now approved as both foster and adoptive homes at the time of approval. While the new approval process is intended to be a streamlined, family-friendly process, in practice, RFA has created delays in approving kinship families and resulted in the denial of approval as a resource family of some families who were previously approved under the old standards. While counties can approve a placement using child-specific approval to ensure children can be placed in the home of stable and appropriate relatives, child-specific approval does not appear to be standard practice and is underutilized as a tool for placing with relatives. The Alliance, Lincoln and our statewide partners have collected hundreds of stories of kinship families encountering barriers in approval as a result of RFA which, in turn, fuels the practice of hidden foster care as families or well-meaning case workers seek to avoid RFA while ensuring that children will be placed in the home of a relative.

In addition, recent changes to federal law are encouraging states to pursue strategies to prevent children from entering foster care, including using relatives as the prevention strategy. 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. The stated purpose of the Act is to "provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-

<sup>24</sup> *Welf. and Inst. Code § 16519.5. For more information, see CDSS Programs: Resource Family Approval <https://www.cdss.ca.gov/inforresources/resource-family-approval-program>.*

based programs, and kinship navigator services.”<sup>25</sup> Specifically, FFPSA seeks to prevent placement of children into foster care by allowing states to utilize 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.”<sup>26</sup> “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.”<sup>27</sup> The mechanics and ramifications of FFPSA remain unclear at this time, but the new law threatens to fuel the practice of hidden foster care.

Finally, California law creates barriers to transferring a case from probate court to juvenile court. When a relative pursues guardianships in probate court at the direction of a county agency and is awarded temporary guardianship, it can be difficult to get the case to dependency court even if that would be the more appropriate venue to serve the parent and the child. The probate court has no mandatory duty to refer cases involving child abuse or neglect to child welfare for investigation. Further, even when a case is referred, the juvenile court is limited in its ability to take jurisdiction because the Court of Appeal held that in addition to finding that the child comes within the standards set forth in Welf. and Inst. Code § 300 the juvenile court must make an additional finding about whether a dependency petition is necessary to protect the child.<sup>28</sup> The Court of Appeal determined that once a temporary guardian has been established, if the guardian is determined to be a “suitable custodian and able to protect the child from the risk posed by the parents’ behavior” then there is no risk to the child sufficient to bring the child under the jurisdiction of the dependency court. This holding makes it nearly impossible for a probate court to provide for the temporary custody of a child and also ensure the case gets before the appropriate tribunal.

In short, the combination of changes in state approval standards, recent case law, and federal law changes that increase political pressure to reduce foster care caseloads and utilize relatives as a prevention strategy makes it increasingly difficult to ensure children who have been separated from a parent by the child protection agency are appropriately connected to kin and served within the foster care system.

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<sup>25</sup> *Public Law 115-123, Bipartisan Budget Act of 2018, Section 50702 (emphasis added).*

<sup>26</sup> *42 U.S.C. § 671(4)(A).*

<sup>27</sup> *Josh Gupta-Kagan, America’s Hidden Foster Care System, 72 Stanford Law Review (forthcoming 2020), p.51.*

<sup>28</sup> *In re Kaylee H., 205 Cal.App.4th 92 (2012)*

# 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 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.

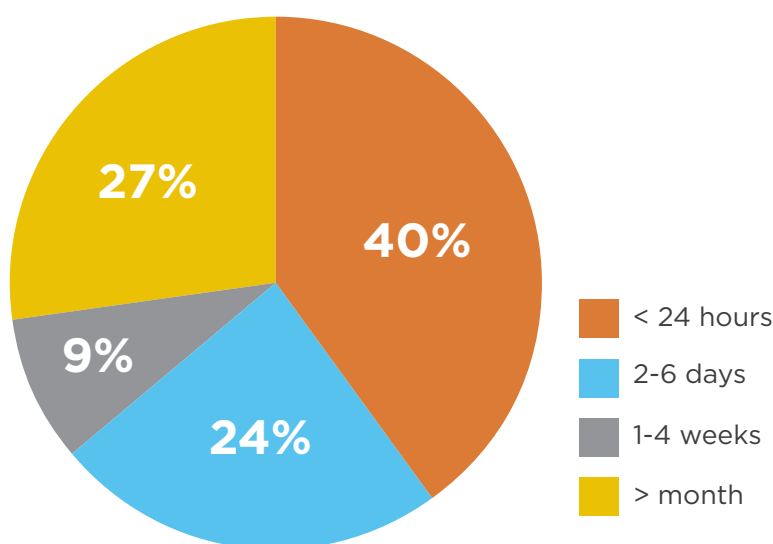
**“When I hear foster care, I hear stranger care. As opposed to foster care means kinship care. How do we get rid of that belief?”**

## **“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 foster care 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.”<sup>29</sup>

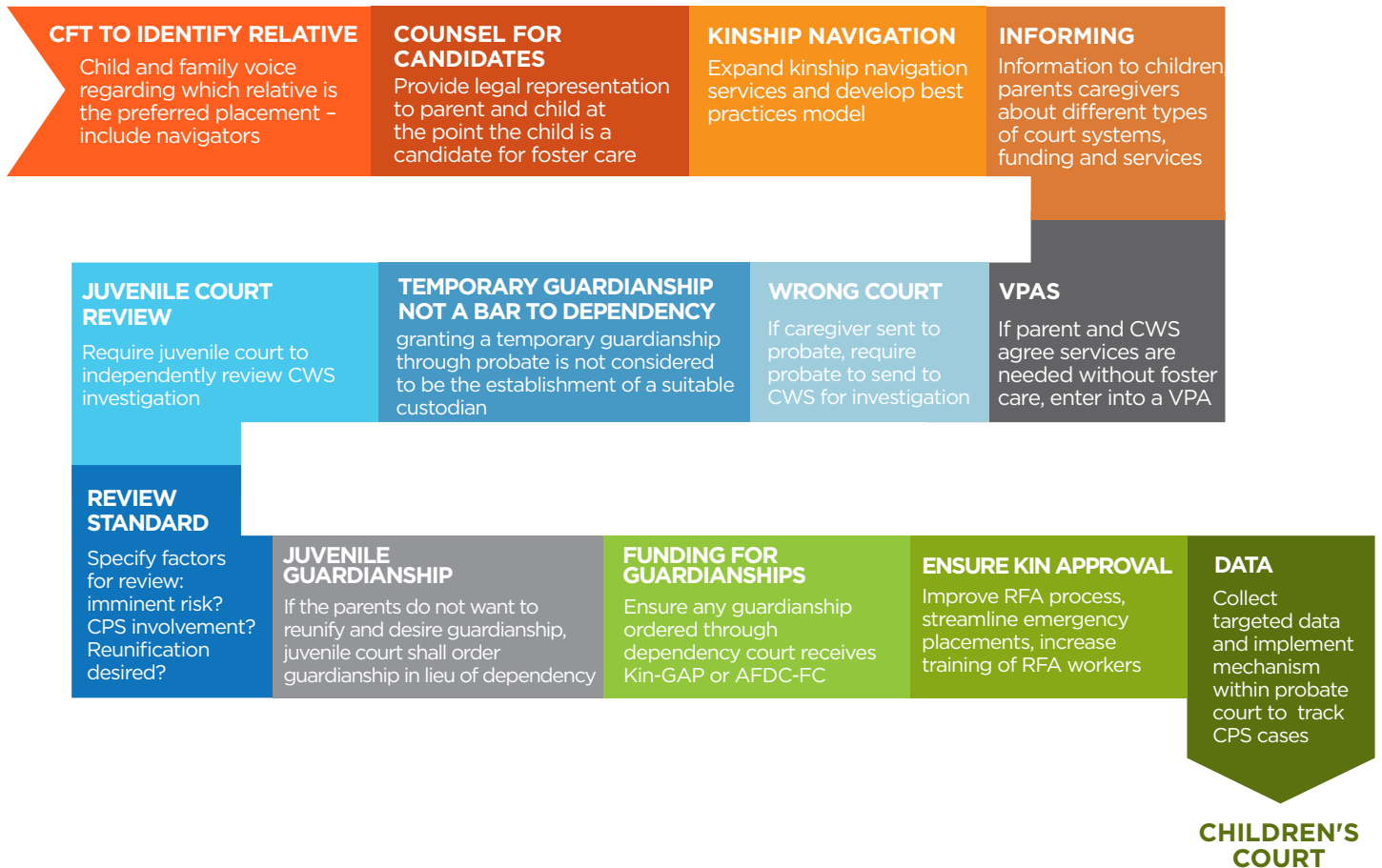
Considering that 92% of service providers indicated that the demand for kinship support services is on the rise, there is a great urgency to meet the needs of the families stepping up to care for vulnerable children in hidden foster care. When asked about the top three greatest threats to stability in 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.

<sup>29</sup> 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.



# HIDDEN FOSTER CARE PERSPECTIVES & RECOMMENDATIONS

FIGURE 2:  
Roadmap of Draft 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 children, parents, and caregivers as well as streamlined processes. The intention of the recommendations is to ensure that the child's, parent's, 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**

## **Supporting Children and Families: Ensuring Available Supports and Resources**

“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 #1: Schedule and conduct a Child and Family Team meeting any time a child welfare worker or probation officer determines a child cannot remain safely at home**

**Issue:** A Child and Family Team (CFT) meeting is required to be convened by the placing agency within the first 60 days of a youth coming into foster care.<sup>30</sup> There is no requirement that a CFT meeting be convened at the point that a child is separated from a parent and moved into a relative's home.

**Background:** Typically, families are unfamiliar with the complicated web of services, agencies, and funding streams that make up the foster care system. The emotional first hours of an emergency placement are just the beginning of multiple contacts with an extensive bureaucracy. The first relative that a county agency identifies may not be the best or most appropriate placement for the child. In addition, there is no forum established to make sure families, inclusive of the parent, child and the relative caregiver, are brought together to receive information about the different types of placements that are available to a family (i.e., voluntary placement agreement, formal foster care placement) or other options that may be available to the family (i.e., guardianship in lieu of dependency, probate court guardianship, etc.). Because CFTs are not convened until 60 days after a youth enters foster care, there is no engagement of the family at the moment that the child is being separated from the parent. If a CFT were convened at the point it is determined that the child cannot remain in the home of a parent, it could be a forum to allow family members to jointly determine who is the best placement for the child and to receive information about the foster care system and other options, as appropriate, such as Voluntary Placements and juvenile court guardianships.

*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.*

### **Solution:**

- Hold a CFT as soon as a child is going to be moved away from a parent so that the child, parent, and family have a forum to share information about available options.
- Develop an information brochure to be provided to caregivers requesting probate guardianships on the differences between probate guardianship and the foster care system including supports and services and RFA and other requirements.
- In cases where an investigation involves an Indian child, and the child's tribe is known, require the county social worker to work cooperatively with the tribal social worker to conduct relevant assessments and case planning measures, including the determination of whether a dependency case should be initiated, to identify an appropriate home for the child, and to determine what services should be offered to the family.

*"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 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."*

<sup>30</sup> All County Letter 16-84.

## **RECOMMENDATION #2:** Provide legal representation any time a child is being separated from a parent through any type of voluntary plan or safety plan

**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 often takes preliminary action to separate a child from a parent as part of safety planning while the child abuse investigation is pending. 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.’<sup>31</sup>

**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.”<sup>32</sup> “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.”<sup>33</sup> At the point a child is considered a “candidate for foster care”, the state may claim federal funding to offset the administrative costs associated with the case, including the cost of providing the child and parent with independent legal representation.<sup>34</sup> Pursuant to this definition, any time a child is being separated from a parent pending an investigation of abuse and neglect, the child would be considered a candidate for foster care. And, it is critical that at the moment any separation of a parent and child occurs, there is advice and assistance of counsel provided in order to ensure that the agency provided reasonable efforts to avoid the removal and to fully counsel the family of their rights and options moving forward.

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.<sup>35</sup> 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.”<sup>36</sup> Without representation, “[s]tate agencies infringe on parents’ and children’s fundamental right to family integrity with few meaningful due process checks.”<sup>37</sup>

### **Solution:**

- Provide legal representation at the point a child and parent are separated due to the involvement of the child protective agency, which would include any time the probate court invokes section 1513(b) and refers the case over to child welfare for an investigation or any time parents are asked to sign a Voluntary Placement Agreement or safety plan placing the child outside of their home.

**“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.”**

<sup>31</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.35.

<sup>32</sup> *Child Welfare Policy Manual*, Section 8.1D (Question 2).

<sup>33</sup> *Child Welfare Policy Manual*, Section 8.1D (Question 2).

<sup>34</sup> *Child Welfare Policy Manual*, Section 8.1B (Question 31).

<sup>35</sup> 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.

<sup>36</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.6.

<sup>37</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.1.

“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.”

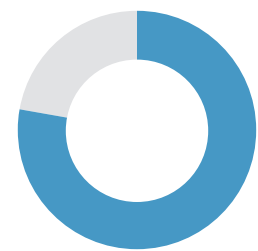
“I did not receive any information about support or options. I am an attorney practicing juvenile law. I have heard that CalWORKs assistance may be available as a non-needy caregiver. I spent over an hour searching the internet to finally get the application. The application seems overwhelming and daunting. 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 #3: Expand kinship navigation services to ensure fully-informed decision-making**

**Issue:** 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 guardianship in lieu of opening a foster care case or establishing formal placement through the delinquency court. 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. Lacking adequate and timely information about the differences in resources and requirements of probate guardianship and the foster care system results in uninformed 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.

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.

**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.



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

## 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.
- 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 or probation officers provide this information to all caregivers.
- 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.

*“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 #4:** Increase use of formal Voluntary Placement Agreements and clarify that safety plans or alternative forms of voluntary agreements are not allowed

**Issue:** In California, many counties facilitate the movement of a child to a relative's home without any documentation or 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.”<sup>38</sup>

*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.*

Similarly, for youth involved in the delinquency system, children are released to relatives without establishing a formal or voluntary placement. In order to establish a formal transfer of care and custody of the child

<sup>38</sup> 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.

away from the parent, the delinquency courts should utilize VPAs when they believe a formal placement (and RFA approval) will not be necessary.

For Native American youth, these voluntary agreements are only valid if the consent for the placement is before a judge.

**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” because it is the family that is “best able to keep the child safe.”<sup>39</sup> “This supposed voluntariness exempts hidden foster care from both court oversight and federal data tracking requirements.”<sup>40</sup> 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 county agency and a parent in order to allow the parent to work toward reunification without having a formal petition filed with the 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.<sup>41</sup> 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.

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.<sup>42</sup>

Because there are only two legal ways for a county agency to separate a child from a parent in California, through a petition filed in the juvenile court or through a 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.”<sup>43</sup>

<sup>39</sup> 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.

<sup>40</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.7.

<sup>41</sup> 42 U.S.C. section 672(e) - (g); CA Welf. & Inst. Code §§ 16507.4, 16507.5, and 16507.6.

<sup>42</sup> CA Welf. & Inst. Code § 16507.4(b).

<sup>43</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.40.

## Solutions:

- 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.”<sup>44</sup>
- Require delinquency courts to utilize VPAs when placement into the relative’s home is agreed to by the parent in order to provide for the temporary care and custody of the child. Absent a VPA, the delinquency court should be utilizing suitable placement orders to place children into the home of a relative and not utilize juvenile hall as a replacement for emergency placements orders.
- Require consent for any “voluntary” placement of an Indian child to occur before a judge in compliance with ICWA.

## 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.”

“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.”

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<sup>44</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.61.

## **RECOMMENDATION #5: Increase authority of the probate 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.<sup>45</sup>

### **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.<sup>46</sup>
- 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.
- Specify that the probate court shall not transfer the case to child welfare for an investigation if the parent, caregiver and the child, if 12 years of age or older, knowingly and voluntarily consent to the establishment of a guardianship in probate court unless the probate court determines that the child is at risk of abuse or neglect in the home of the proposed guardian. Consent shall be in writing, following discussion with the probate court investigator, and shall document the parties understand the impact on reunification, funding, services, and legal representation of the child and parent.

**"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."**

**"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

<sup>45</sup> Prob. Code § 1513(b)

<sup>46</sup> Prob. Code § 1513(b) was amended after the decision in *Guardianship of Christian G.* (2011), 194 Cal.App.4th 581, which held that the Probate Court had a mandatory duty to refer cases involving allegations of abuse or neglect to CPS and that the referral is "intended for the benefit and protection of abused and neglected children."



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 Welf. and Inst. Code § 300 or to require the dependency petition to be filed once a child has already been placed through a temporary guardianship in the relative's home.

**Background:** If the probate court refers a case to the social services agency, Welf. and Inst. Code § 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 Welf. and Inst. Code § 300, or, perhaps more likely, that the case does fall under Welf. and Inst. Code § 300 but that there is no longer any imminent threat of harm to the child because the child now resides 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 Welf. and Inst. Code § 300. If the child does fall under Welf. and Inst. Code § 300, the juvenile court must further find that a dependency petition is required to protect the child.<sup>47</sup> However, if the probate court has already taken action to provide for the temporary custody needs of the child by granting a temporary guardianship, then the child is determined to no longer be at risk of harm.<sup>48</sup>

If, instead, the probate court determines that the child would benefit from reunification services and supports through the juvenile court and therefore does not grant a temporary guardianship in order to avoid the holding in *Kaylee H.*, the child and caregiver are left in legal limbo until the child welfare agency completes its investigation and until some court finally takes action.

The end result is that caregivers who accept temporary guardianship of a child 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 foster care system. Alternatively, these families may risk further harm to the child by failing to seek a temporary guardianship, as there is nothing stopping a parent from reclaiming the child until the child protective agency takes official action or a guardianship is ordered. It's a catch-22 for families that the law does not resolve.

## 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 § 1513(b).
- Clarify that granting a temporary guardianship through probate court is not considered to be the establishment of a suitable custodian or a determination that the temporary guardian is able to protect the child from the risk posed by the parents' behavior permanently.
- 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 family would benefit from reunification, a Welf.

<sup>47</sup> *In re Kaylee H.*, 205 Cal.App.4th 92 (2012).

<sup>48</sup> *Id.* (the Court of Appeal held 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).

and Inst. Code § 360 legal guardianship, or other child welfare services; (2) Whether the parent or child objects to the guardianship that was proposed in the probate court or to the temporary guardianship ordered by the probate court; (3) If a temporary guardianship was established, whether the temporary guardian served as the caregiver for the child prior to the initiation of the guardianship proceeding or any child protection investigation; and (4) The length of time that the child has resided in the home of the relative or with the temporary guardian, if a temporary guardianship was established.

- If the court determines that the juvenile court is best able to serve the family and protect the child, the juvenile court shall order the social worker to commence juvenile court proceedings.

**“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 Welfare and Institutions Code § 360(a) guardianships and ensure that parents can designate individuals they determine to be fit to serve as the guardian**

**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.

**Background:** California law includes a mechanism by which a juvenile court can find that a child comes within Welf. and Inst. Code § 300 but not order the child into foster care, as long as the parent is not interested in family maintenance or family reunification services.<sup>49</sup> This provision of law overcomes the argument that

<sup>49</sup> “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 § 360(a).”

allowing counties to divert families to probate court is necessary to preserve family integrity and decision-making about where their children should live.<sup>50</sup> This is particularly true because there is no requirement that the relative be approved as a resource family or be required to complete Resource Family Approval to become the guardian under Welf. and Inst. Code § 360(a). Thus, if the parent does not object to the guardianship, there should be no reason to refer the caregiver to the probate court because the juvenile court can order the guardianship without adjudicating the child a dependent and without requiring the relative to go through the arduous resource family approval process. However, guardianships through the juvenile court still require a review of the Child Abuse Central Index and criminal background check, which can lead to the juvenile court denying guardianship in instances when the relative would be the best caregiver for the child.

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, as long as the parent is protected in their ability to choose the guardian for the child absent a showing of an articulable threat to the child if that individual is designated the child's guardian. Further, by routing cases through the juvenile court which may qualify for a guardianship order, the parents would have access to legal counsel through the process of deciding whether to seek reunification or consent to the guardianship. The child(ren) would likewise have legal representation and be meaningfully advised and heard during the court process.

### Solution<sup>51</sup>:

- If following the juvenile court's review the court determines that the child falls within Welf. and Inst. Code § 300 but the parent(s) do not desire to reunify and consent to the guardianship, following the assistance of and representation of counsel, the court can order a guardianship pursuant to Welf. and Inst. Code § 360(a).
- Amend the statute to clarify that a parent has the ability to designate the guardian of their choice, provided that individual agrees to serve as the child's guardian, unless the agency can identify a clear and present threat to the child's health and safety in the proposed guardian's home.

**"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 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."**

<sup>50</sup> 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.

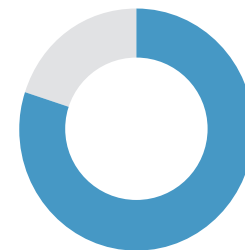
<sup>51</sup> The solutions for recommendations #6 and #7 are the same because the end result is that cases that involve abuse and neglect are properly adjudicated by the juvenile court and the probate courts should be relieved of the responsibility of deciding matters that involve fundamental rights 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.

## RECOMMENDATION #8: Fund all guardianships ordered pursuant to Welfare and Institutions Code § 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 Welf. and Inst. Code § 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).<sup>52</sup>

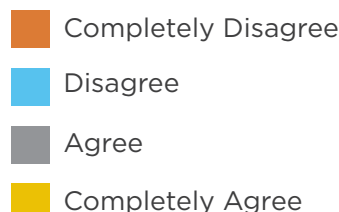
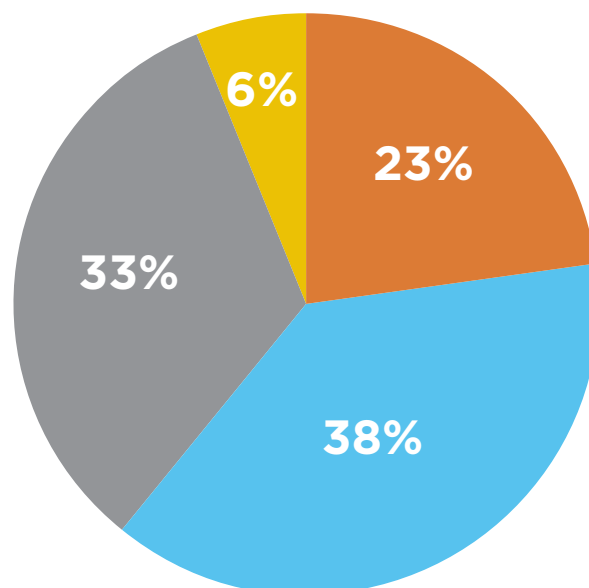
**Background:** A Welf. and Inst. Code § 360(a) guardianship permits a child who has experienced abuse and neglect and has been found to come within Welf. and Inst. Code § 300 to avoid coming into foster care if the parent is not interested in family maintenance or reunification, agrees to the guardianship, and the guardianship is found to be in the child's best interest. In these circumstances, it is unusual for the Welf. and Inst. Code § 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 Welf. and Inst. Code § 360(a) guardianship is ordered.

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 services supervision of the placement.”<sup>53</sup> 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.<sup>54</sup> The presumption under federal law is that children are separated from a parent through either a VPA or a petition filed with the juvenile court.<sup>55</sup> In California, juvenile courts



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

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



<sup>52</sup> “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 in Article 4.5 (commencing with Section 11360) of Chapter 2.” CA Welf. & Inst. Code § 360(a).

<sup>53</sup> CA Welf. & Inst. Code § 11361.

<sup>54</sup> 42 U.S.C. § 672(d)(3).

<sup>55</sup> As a result of FFPSSA, 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.

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 the state 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.

### Solution:

- Amend Welf. and Inst. Code § 360(a) to allow for the provision of state-only Kin-GAP benefits to any child who has a guardianship established under Welf. and Inst. Code § 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 to be able to claim federal funds for the subsidized guardianship payment, amend Welf. and Inst. Code § 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 Welf. and Inst. Code § 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.

*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.*

**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.

### Solution:

- Improve RFA processes to ensure that kin families can complete RFA:
  - Revise child specific approval policy to require approval of families as long as basic health and safety standards are met and placement with that relative is in the best interest of the child.
  - Create a timeline for consideration by the court of a relative's request for placement and an appeal system to ensure a relative who is denied placement of a family member can expeditiously appeal that denial.
  - Clarify that capacity alone cannot be the basis for denying placement of siblings together in a relative's home.
  - 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 and ensure these processes apply to all youth, including youth in the probation system, 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.”<sup>56</sup> Further, “states interested in the well-being of vulnerable children

<sup>56</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.63.

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.”<sup>57</sup>

**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 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.”<sup>58</sup>
- 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.
- The number of days youth spend in detention awaiting a placement.
- Any prior child welfare investigation or substantiation (regardless of time period when the investigation or substantiation occurred)
- Separate entries into foster care to track those children who are being removed directly from a parent and those children who were living with a relative at the time of the petition being filed or living with a guardian established through probate court at the time the petition is filed

**“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.”**

<sup>57</sup> 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.

<sup>58</sup> Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stanford Law Review* (forthcoming 2020), p.6.

## **RECOMMENDATION #11: Create a children’s court to unify probate, delinquency, 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 § 1513 and Welf. and Inst. Code § 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.” Further, children adjudicated through the delinquency system who are also in need of placement outside the home of a parent are often denied the protections and supports of foster care because the case is not appropriately adjudicated and children are released to relatives who are not their parent.

**Background:** Juvenile dependency cases are the jurisdiction of the dependency court – the court tasked with focusing on the care and custody of children who do not have a safe home in which to live and are in need of alternative care. The dependency court has the authority to remove a minor from the parents’ custody for the child’s well-being and safety. The other courts that deal with issues of child safety and custody are intended to serve other purposes, but it is often the child’s safety concerns that have led to their appearance before these separate tribunals. For example, the probate court is intended to establish custody for children who have been orphaned, not to adjudicate cases alleging parental unfitness or abuse. Further, the probate court can only grant a probate guardianship if the child is not involved in a family court or juvenile court action. Similarly, the delinquency court is intended to deal with cases involving status offenses or the criminal acts committed by a minor, but these cases are infinitely more complicated when the child accused of the crime does not have a safe home to return to and is, themselves, the victim of abuse and neglect.

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.”<sup>59</sup>

### **Solution:**

- Create a children’s court to replace probate, family, delinquency 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.
- Until a unified court is created, a judge could be appointed to assess any case where custody and placement of a child is at issue in order to determine what is the proper tribunal to adjudicate the issue.

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<sup>59</sup> *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>.





## CONCLUSION

The complexity of the foster care 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 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 toward 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.

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