

AMERICA'S HIDDEN FOSTER SYSTEM – BRINGING FAMILY SEPARATIONS WITHOUT DUE PROCESS TO LIGHT

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What is “Hidden Foster Care”?

And when, where, and how often is it happening...

A legislative definition

The term “hidden foster care practice” means the separation-of a child from the parent or parents of the child, the legal guardian of the child or the individual who was acting in loco parentis for the child prior to involvement of the State or local child protection agency (whether the child; or the parent, parents, or individual primarily responsible leave the home and the arrangement for others to live with and care for the child during the course of a State or local child protection agency’s involvement with the family (including, but not limited to, an investigation of or other response to an allegation of neglect or abuse regarding the child and an in-home or preventative services case involving the child).

A legislative definition

Without a State or local agency taking legal responsibility for the care and placement of the children, and without the State or any agency or legal subdivision thereof filing an action in a court of law alleging the child is neglected, abused, or dependent-including by asking, directing, or deciding in the absence of the parent, parents, or individual primarily responsible to—

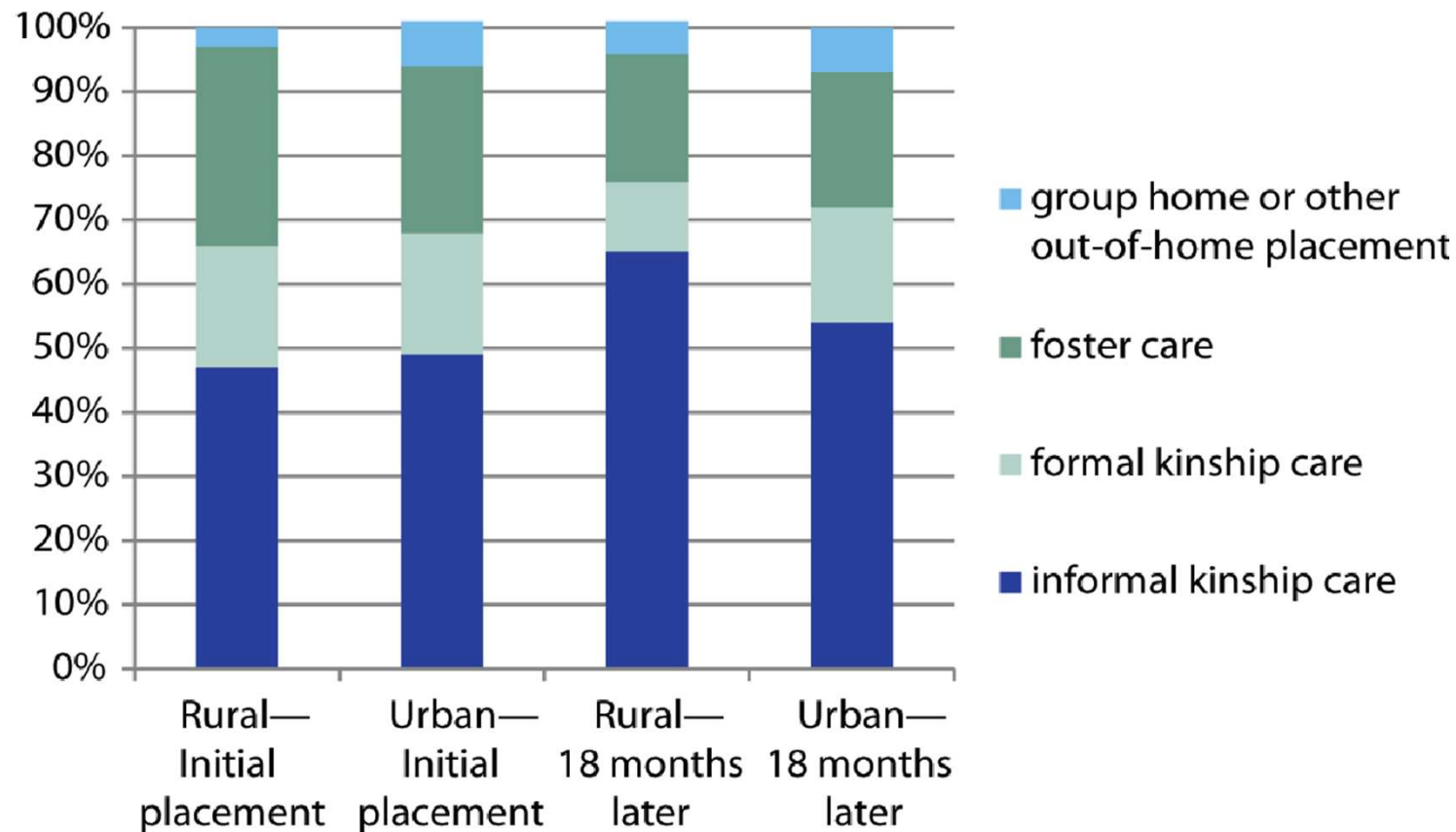
A legislative definition

- (1) send a child to live with someone else in another location;
 - (2) leave the home of the child and allow or require another adult to live with the child in the home;
- and
- (3) allow another adult into the home to supervise contact between parents and their children-

The “hidden foster care practice” includes State, county, local or Tribal child protection agency taking, causing, recommending, requiring or overseeing the actions set forth in (1)-(3), or arranging for such actions to occur.

-
- CPS seeks a **change in custody** to protect a child
 - During or after an investigation
 - But no legal custody change
 - CPS **uses state power** to make that custody change happen
 - “If the parent(s) refuse to sign a valid safety plan, an out of home placement must be sought by Law Enforcement or Ex parte Order to keep the child safe” (South Carolina Department of Social Services, Form 3087, Safety Plan)
 - Child **lives with kinship caregiver**
 - 32% of *formal* foster children (Children’s Bureau, Foster Care Statistics 2017)
 - **Unknown duration**: sometimes the child returns home, sometimes the child stays permanently with the kinship caregiver
 - Texas (2014): 40% reunified within one year, 12% were petitioned

Out-of-home placement settings after maltreatment report and 18 months later (2008-09)





HIDDEN FOSTER CARE *SYSTEM*: HOW BIG IS THIS, REALLY?

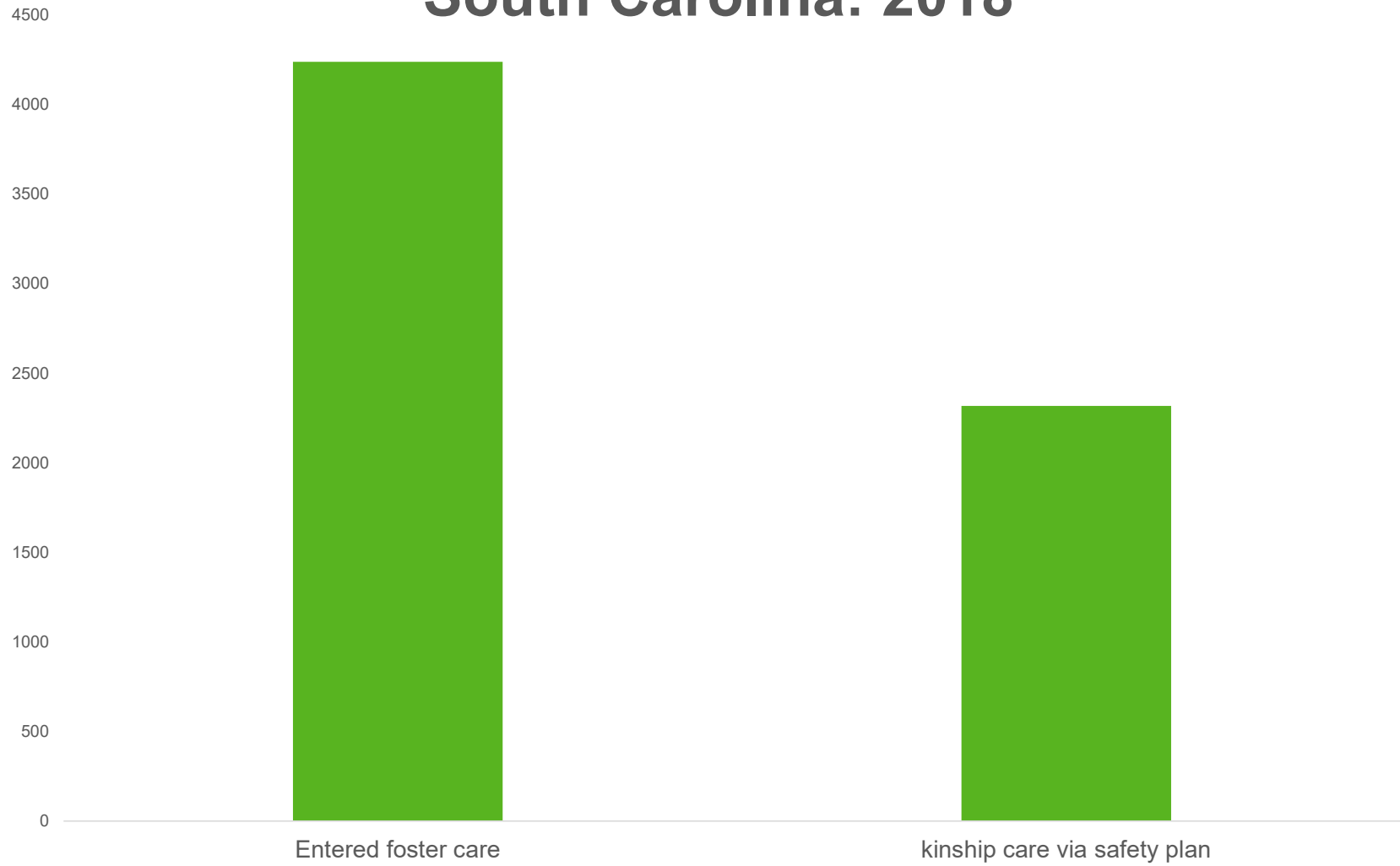
- “We compared the frequency of kinship diversion to the frequency of entry to foster care. In some jurisdictions, for every 10 children entering foster care, an addition 7 were diverted, while in others there was an equal split – for every child entering foster care, another child was diverted.”

Child Trends, Variations in the use of kinship diversion among child welfare agencies (2019)

- “quite common,” “increasing,” “often,” “increasingly important”

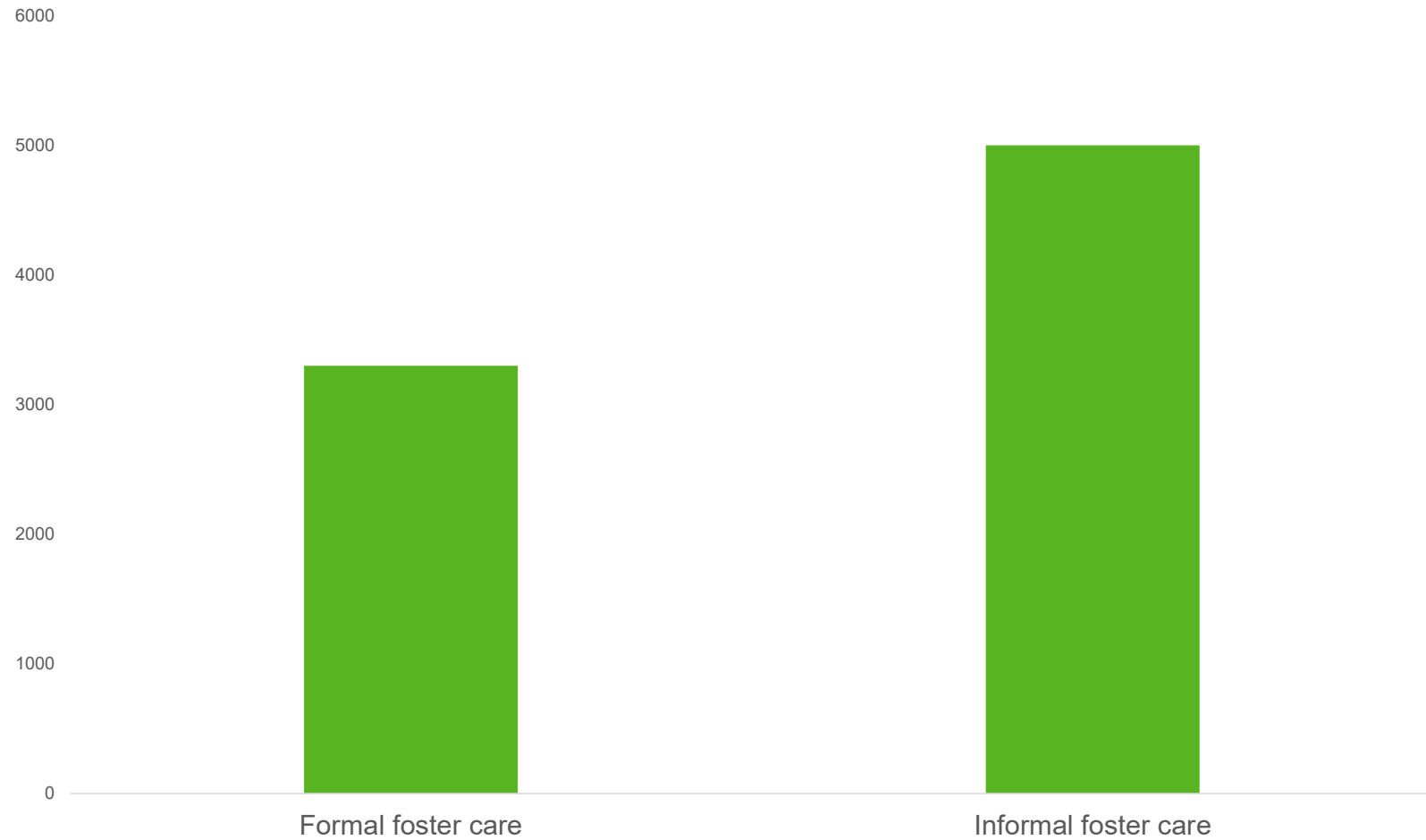
Child & Family Social Work, Child Trends, Journal of Family Social Work, Child Welfare

South Carolina: 2018



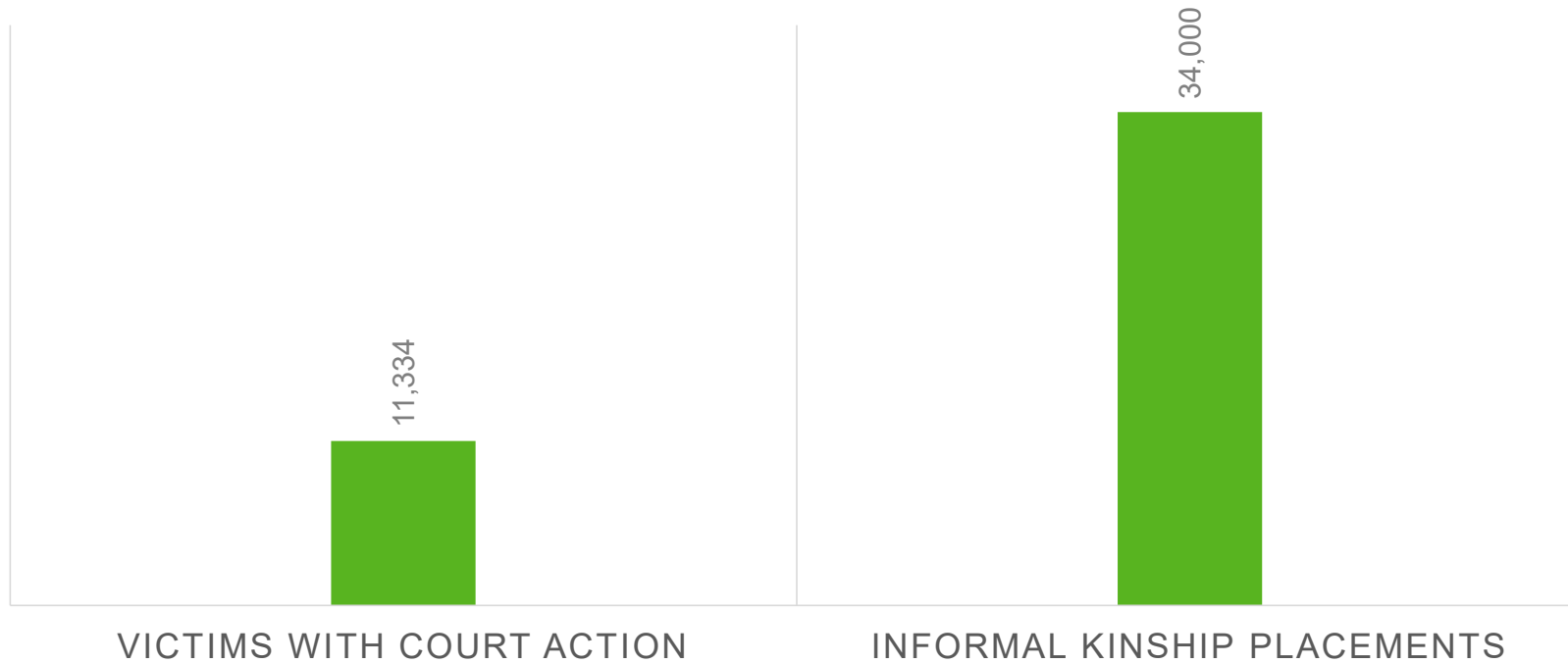


Virginia: July 2016-December 2017

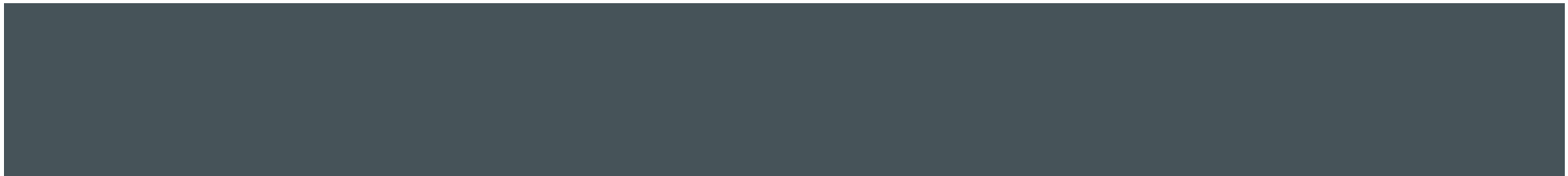
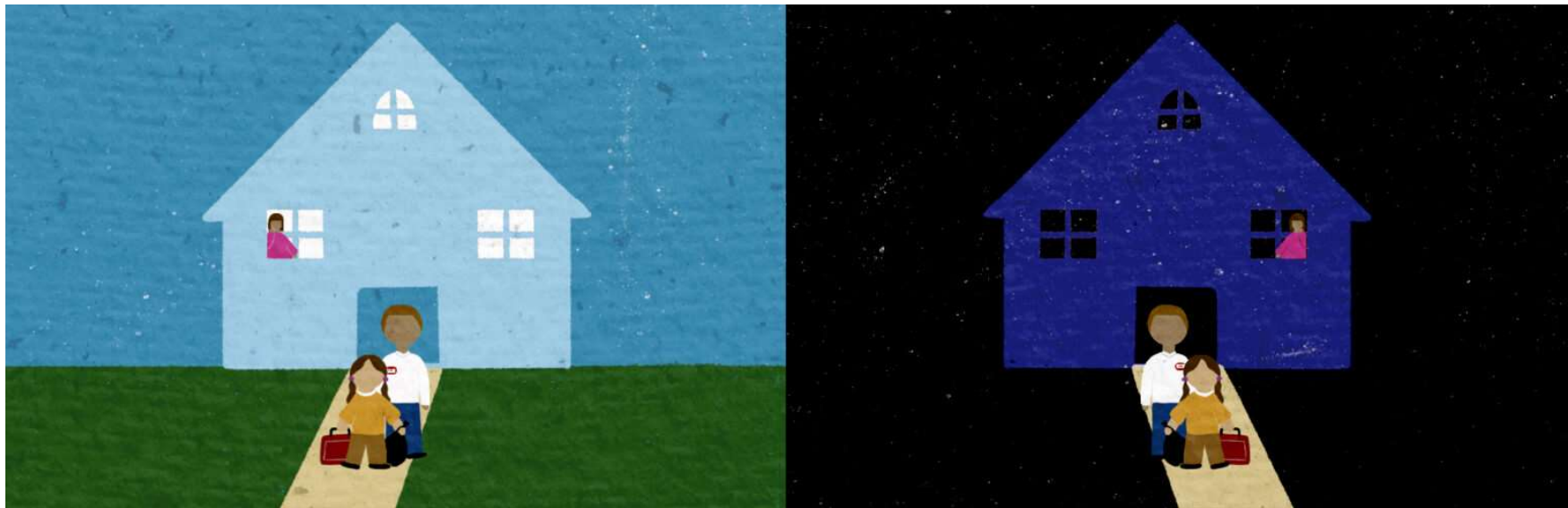


EVERYTHING'S BIGGER IN TEXAS

TEXAS: 2014



Why do states use hidden foster care?



Why do states do this?

Part I

Financial incentives



Formal foster care

- Foster care subsidies
- Adoption & guardianship subsidies
- Staff and administrative costs
- *Partial* federal reimbursement for *some* families

Hidden foster care

- No foster care subsidies
- No permanency subsidies
- Limited staff and administrative costs

Why do states
do this?

Part II

Family First Preventive and Services Act

Does FFPSA prevent family separation or just prevent foster care?

- **Children's Bureau (Program Instruction 18-09)**
 - FFPSA seeks to prevent “the trauma of unnecessary parent-child separation.”
- **Statutory text**
 - “candidates”: children “at imminent risk of entering foster care . . . Who can remain safely in the child’s home or in a kinship placement.” 42 U.S.C. § 675(13).
 - CPS agencies should use a “foster care prevention strategy” such as having the child “live temporarily with a kin caregiver until reunification can be safely achieved, or live permanently with a kin caregiver.” 42 U.S.C. § 671(e)(4)(A)(i)(I).



Most critical
consideration:
When is a transfer
of custody truly
voluntary

HOW HAVE THE COURTS CONSIDERED HIDDEN FOSTER CARE: “LAWFUL THREAT” OR COERCION?

- *Croft v. Westmoreland County CYS* (3d Cir.): “Defendants repeatedly have characterized Dr. Croft’s decision to leave as ‘voluntary.’ This notion we explicitly reject. The threat that unless Dr. Croft left his home the state would take his four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken.”



Due Process: “Lawful threat” or Coercion?

Dupuy v. Samuels (7th Cir.):

- It is not a forbidden means of “coercing” a settlement to threaten merely to enforce one's legal rights. . . . This just notifies the parents of the **lawful measures** that may ensue from their failure to agree to a plan **There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse, and even in that case . . . if a child is actually taken, the parents have a very prompt legal remedy.**
- We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options.

*“If you tell a guest that you will mix him either a **Martini** or a **Manhattan**, how is he worse off than if you tell him you'll mix him a **Martini**?”*



Safety Plan



Foster Care



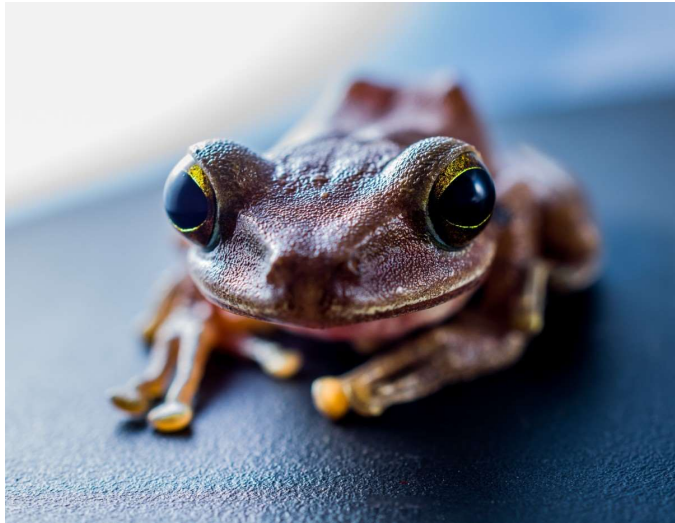
“Lawful threat” vs. coercion under *Dupuy*

- *Dupuy*. There would be a due process problem if “it was a threat the agency had no right to make.”
- “For the lynchpin of voluntariness to turn on whether a state actor has the legal authority to execute an emergency removal, is to suggest that parents looking down the barrel of the state's gun ought to know whether its chamber is loaded.”

Ryan Shellady, *Martinis, Manhattans, and Maltreatment Investigations*,
104 Iowa Law Review 1613 (2019)

POST-*DUPUY* AND POST-*CROFT* CASES

- Cases present demonstrations of coercive context of the safety plan demand
 - Hernandez/Trilogy
- Cases clarify practice is unlawful when there is a lack of a basis for safety plan/separation
- Some cases establish need for due process despite claim of valid basis
- Limit qualified immunity where there is clearly a baseless threat
- Child plaintiffs' cases challenge use of hidden foster care as denial of benefits/case plans for children



WHY DOES VOLUNTARINESS MATTER?

Voluntariness is “an amphibian.”

- Voluntariness operates as a waiver of the fundamental right of familial association.
- When the right is validly waived, no process is required to prove a basis for the separation.
- But without process how do you assess voluntariness...
- Ordinarily, threats make agreements “less than fully voluntary.”
- This is why we admonish parents in court when they enter pleas.....



COERCION IN THE GUISE OF VOLUNTARINESS

- In *Dupuy* the district court had found parents were expressly threatened despite what the form said.
- 7th Circuit said parents just had to “call the state’s bluff”
 - But, no parent ever had done so; district found none would!
 - Plus, “mere suspicion” was enough to issue the threat of removal as long as not affirmatively misleading.
 - Parents had no way to know what evidence the state has gathered.

IF WE WERE TO
ASSESS THE
VOLUNTARINESS OF
SAFETY PLANS
THAT SEPARATE
CHILDREN AND
PARENTS:

- THE "TOTALITY OF THE CIRCUMSTANCES"
includes:
 - presence of threats, promises
 - bargaining power
 - education/understanding
 - time pressure to agree (take it or leave it negotiation)
 - access to counsel
 - ability to rescind/modify agreement
- Plus, a forum in which the voluntariness of an
"agreement" can be reviewed
- In reality, safety plans are labelled voluntary with
effectively NO indicia of voluntariness!



Hidden Foster Care: Racial Justice Implications

-
- Impacts families of color, especially Black families
 - Exploits Black community's ethic of communal caregiving
 - Exacerbates already precarious financial situation of kin caregiver
 - No support or resources for parent to address alleged safety issue(s)
 - No plan for reunification
 - Disrupts or worsens family dynamics/relationships
 - Perpetuates racial inequities by shifting government financial responsibility to already under-resourced communities of color

ICWA, Voluntary Proceedings, and “Safety Plans”

- Congress enacted ICWA to protect the rights and interests of the parent, the Tribe and the child. It protects the unique relationship between a Tribe and its children. ICWA protects the child’s relationship with family, community and Tribal membership.
- ICWA does not apply to a “voluntary placement” but this is actually pretty narrow
 - Does not apply only when the parent or Indian custodian can regain custody upon verbal demand without any formalities or contingencies.
- ICWA does apply to any “voluntary proceeding” that prohibits the parent from regaining custody of the child “upon demand”
- Use of any coercive “safety plan” violates ICWA

ICWA and Emergency Removal

- Emergency Removal allowed under applicable state law to prevent “imminent physical damage or harm.” 25 U.S.C. § 1922
- Emergency removal must end when no longer necessary
- In an “emergency proceeding,” court must address whether emergency removal is warranted and determine if removal should be ongoing
- Resolve emergency by:
 - Initiation of “child-custody proceeding”
 - Transfer to Tribal Court
 - Restoring child to parent or Indian Custodian
- Time limited – emergency can generally last only last 30 days

ICWA: Emergency Proceeding versus Child Custody Proceeding

Emergency Proceeding 25 CFR § 23.113

- Emergency defined by state and federal law
- Time-limited, generally only 30 days
- Court must review whether emergency exists or has ended
- Removal ends when emergency is over

Child-Custody Proceeding

- Notice to Tribes
- Right to Counsel for parent or Indian Custodian
- Active Efforts
- Placement Preferences
- Expert Testimony to support removal

ICWA Cases Practice Issues

- Always inquire to determine if case involves an Indian child
- Ensure attorneys and advocates are trained on ICWA
- Develop relationships with Tribes who have members in the community
- Review state laws and procedures for compliance with ICWA



In practice: Hidden foster care hurts children, parents, and caregivers.

IMPACT OF HIDDEN FOSTER CARE: **Parents, Children, Kin Caregivers**

- Parent-child separation → similar trauma of removal and harm to parent-child relationship and uncertainty about living arrangement
- No neutral decision-maker to review separation, visitation, conditions of reunification, etc.
- No counsel
 - Family may be disempowered regarding key decisions
- No agency obligation to provide services to prevent removal and achieve reunification
- Kinship caregivers lose foster care maintenance payments, supports, and often no legal relationship established; may have problem enrolling child in school or getting medical treatment
- BUT - may be less invasive and thus preferred to formal foster care and court oversight depending on the unique facts of the specific case

HOW MUCH DO YOU TRUST CPS?

- Did abuse or neglect occur? If so, can the child stay safely at home? What reasonable efforts are required?
- If the child must be removed, where should she stay?
- What must be done for the child to return home?
- Has the parent done enough to reunify?
- If the child does not return home quickly, what should happen?



Chelsy's Story: Parenting foster youth are especially vulnerable to HFC

May 20, 2015

I Chelsy Rouse being of sound mind and having a clear conscious hereby give temporary custody of my son Zechariah [REDACTED] to the grand parents [REDACTED] until I get permanent housing for me and my child in a safe environment, or in another program that's suitable for the two of us to survive. Rather it be with CHP Housing, My mom, Melissa Flores or with my Fiancée [REDACTED]

I also give all temporary educational and medical rights for my son Zechariah to the grand parents [REDACTED] to be able to make decision on my behalf, While my son Zechariah is in their custody.

I (Mom) Chelsy would like to have visiting rights weekly, so that this would allow me to continue to bond with my son Zechariah on the days that's convenient for myself Chelsy Rouse as well as the grand parents [REDACTED] preferably on the week ends.

This contract shall remain in full force and effect until all these matters are met, for the well being of the child Zechariah [REDACTED]

Mom: Chelsy Rouse Chelsy Rouse
Date 5-20-15

Witness: P.O. Violeta [REDACTED] DPH
Date 5/20/15

Witness: Mother Melissa Flores Melissa Flores
Date 5-20-15

Yvette's Story:

The use of family/probate private guardianships



- In addition to safety plans, families are often encouraged to transfer custody through private action
- These actions can have permanent consequences
- Families often acting/agreeing out of fear

Evelyn's Story

- **Have no fear, grandma is here!** – relatives, often older and retired grandparents, step in to keep minor loved ones out of the traditional foster care system
- **Lots of love, but little resources** – some kinship caregivers are informed about kinship foster parenting/licensing; for others, there are few resources available
- **A challenging job made harder** – guidance and assistance is often lacking beyond financial resources for kinship caregivers: *e.g.* medical insurance, school enrollment, daycare, summer and after-school programs, counseling services, financial aid, housing, public assistance, etc.

Mary and Kayla's Story (video clip)

<https://www.youtube.com/watch?v=v5-JBpshsho>



RAISING HIDDEN FOSTER CARE CONCERNS IF THE CASE COMES TO COURT

Questions to ask the caseworker



Hidden Foster Care Systemic Action: Litigation, Legislation, and Policy



CIVIL RIGHTS ACTIONS: North Carolina Federal Lawsuit Challenging Diversions



Hogan et al. v. Cherokee County et al. denied the County's motion for summary judgment with respect to plaintiffs' substantive and procedural due process claims in the context of a separation of a child from her parent pursuant to a diversion arrangement, and a jury awarded the parent and child millions in damages for the illegal separation. 2021 WL 535855, *7-8 (W.D.N.C. 2021).

See Presser, Lizzie. "How Shadow Foster Care Is Tearing Families Apart." *The New York Times Magazine*. 1 Dec. 2021, available at <https://www.nytimes.com/2021/12/01/magazine/shadow-foster-care.html>.

CIVIL RIGHTS ACTIONS: DC KinCare Alliance

- DC KinCare Alliance has filed 6 federal lawsuits on behalf of 20 relative caregiver and child plaintiffs challenging DC's practice of hidden foster care. The cases bring the following claims:

- Violation of D.C. Child Abuse and Neglect Act
- Violation of D.C. Human Rights Act
- Violation of U.S. Social Security Act
- Violation of Equal Protection Clause of U.S. Constitution
- Violation of Due Process Clause of U.S. Constitution (substantive and procedural)
- Negligence
- Fraudulent Misrepresentation
- Negligent Misrepresentation
- (Equitable Estoppel)

➤ *K.H. et al. v. D.C.*, No. 19-3124 (D.C.D.C. filed Oct. 18, 2019); *S.K. et al. v. D.C.*, No. 20-00753 (D.C.D.C. filed March 17, 2020);

D.B. et al. v. D.C., No. 21-00670, *T.J. et al. v. D.C.*, No. 21-00663, *M.S. et al. v. D.C.*, 21-00671, and *S.S. et al. v. D.C.*, No. 21-00512

(D.C.D.C. filed March 11, 2021).



HOW DOES "HIDDEN FOSTER CARE" WORK?

Defying both federal and D.C. law, the child protection agency places the child in the home of a relative **"without providing the legally required due process, services or supports, including foster care maintenance payments."**



POLICY CHANGE NEEDED

Ensure Due Process Protections for Families:

- Right to counsel for families in connection with proposed agreement
- Right to a court hearing on the proposed agreement
- Strict time limits that are enforced

Require Data Collection and Reporting (see data slide)

Remove Systemic Barriers for Relative Caregivers to Access Supports and Services:

- Reform documentation requirements to obtain TANF
- Reform childcare subsidy requirements
- Ensure local housing authority is following federal and local fair housing requirements and its own regulations

Support Relative Caregivers So They Can Support and Stabilize Children:

- Have a fully functioning kinship navigator program that is separate from the child welfare agency
- Subsidies for relative caregivers similar to the DC Grandparent and Close Relative Caregiver Programs (and ensure amounts are on par with foster care subsidy amounts)
- Provide legal support for relative caregivers so they know all of their rights before agreeing to anything
- Help relatives obtain the legal rights they need to care for the children

HFC REFORM STATEMENT OF PRINCIPLES

The following reflects the consensus views of members of the Hidden Foster Care Working Group, a diverse coalition of advocates for parents, children, and kinship caregivers.

- Family integrity is a fundamental right protected by the U.S. Constitution. Any proposed separation or agency-imposed restriction, including those portrayed as voluntary or that occur without court oversight, are restraints on liberty and must conform to Constitutionally required due process protections.
- Circumstances related to poverty, race, or culture are never a valid reason for the state to separate families or impose other restrictions on families.
- Agencies should never separate families or impose other restrictions when a child is not in imminent danger of harm due to abuse or neglect.
- Parents have an absolute right to counsel whenever an agency seeks the separation of a child from their parents or other restrictions on the parent-child relationship.
- Agencies have an affirmative duty to actively negotiate with the family and their counsel regarding the terms of a proposed arrangement and to identify community-based resources to address areas of concern or alleged grounds for separation.
- Families and their counsel have the right to identify their own resource providers and are under no obligation to utilize providers under contract with the agency.
- Alleged grounds for separation or areas of concern must be shared with parents and their counsel specifically and in writing at first contact.

HFC REFORM STATEMENT OF PRINCIPLES (contd.)

- Resources must be culturally responsive and narrowly tailored to address the specific areas of concern or alleged grounds for separation identified by the agency and parent. Agencies must not require unnecessary services or interventions unrelated to areas of concern or alleged grounds for separation.
- Parents should have a right to request a hearing related to the proposed arrangement.
- Arrangements shall be temporary, brief, and time limited as negotiated between the agency and parents' counsel. Terms of the arrangement, including conditions for the return of the child must be clear, understandable, and in writing.
- Before a child is placed with a kinship caregiver under an agreement between the agency and parents, the agency shall provide the proposed kinship caregiver with written notice that sets forth: (a) the terms of the agreement, that they are under no obligation to consent to care for the child pursuant to those terms, and that they have the right to decline to care for the child; (b) the rights, responsibilities, options, and resources available to them if they decide to care for the child; and (c) their right to consult with legal counsel and to have counsel represent them in connection with their decision to care for the child.
- The agency has an affirmative duty to assist the kinship caregiver to obtain any documentation or other resources necessary to care for the child and ensure the stability of the placement.
- A kinship caregiver may decide not to care for the child at any time, and that decision alone shall not result in any adverse action against the caregiver, such as the bringing of a neglect case against the caregiver or future disqualification as a formal or informal resource for the child and family.
- Seeking or facilitating parent-child separations outside of the legal removal process does not amount to reasonable efforts to preserve families or prevent removals.

STATE LEGISLATION

Several states are taking action to reform Hidden Foster Care. Four notable examples:

- Texas: House Bill 2680 (2023; Hull - R); requires appointment of counsel for indigent parents, limits placements to 30 days, requires agency to track and report number of hidden foster care placements. Enacted.
- New Mexico: Senate Bill 31 (2023; Duhigg, Lopez, Hemphill - D); requires access to counsel for parents asked to sign a voluntary placement agreement; requires that caregivers receive a foster care subsidy; decreases the time by which a child must be returned to a parent if the parent terminates the agreement.
- California: Assembly Bill 260 (2021; Stone - D); allows juvenile court judges, at the request of the probate court or any party, to review cases referred to probate courts to prevent the child welfare agency from bypassing dependency court when there is evidence that a child has been abused or neglected. Enacted.
- California: Assembly Bill 2309 (2022; Friedman - D); requires data collection and reporting concerning children subject to a voluntary placement agreement.
- New York: Assembly Bill 08090 (2022; Hevesi - D); defines “alternative living arrangement,” requires data collection and reporting, limits placements to 5 days with option for one 5 day extension, does NOT include right to counsel. Controversial because NY already has a statute allowing for temporary removal of a child with consent of parents (Family Court Act 1021), which includes right to counsel, a 3 day time limit, and more robust protections for parents. Pending.

FEDERAL LEGISLATION: DATA COLLECTION/OUTCOMES

Currently, the U.S. Department of Health and Human Services does not require states to report data on hidden foster care arrangements; leads to lack of transparency and wide variations among states

Types of Data Needed:

- Number of children subject to hidden foster care arrangements
- Racial/National Origin Demographics of children and families in hidden foster care
- Types of hidden foster care placements (i.e. relative, friend, etc.)
- Number of children who enter formal system out of hidden foster care
- Number of children reunified with parents from hidden foster care
- Length of stay: 5 days, 6-10 days, 10-30 days, more than 60 days, more than 180 days, more than a year
- What services, benefit or supports are provided to/received by kinship caregivers and parents, including legal services
- How many cases of hidden foster care are ultimately unfounded after an investigation and why, or were substantiated and why
- Maintaining a centralized repository of the agreements that parents are asked to sign

Potential federal legislation to require this data collection on the horizon

What are we hoping to see soon?

- A data bill so we really know when and where HFC is happening.
 - PLAN/HOPE: Sponsored by Rep. Gwen Moore (D. WI), Nancy Mace (R. SC), and other co-chairs of caucus on foster youth
 - PLAN/HOPE: Sponsored by Sen. John Cornyn (R. TX)

Hidden Foster
Care
Working
Group:
Congressional and
Children's
Bureau
policy "asks"

- Data is an essential first step.
 - What we don't know: how many children would go into foster care if hidden foster care were not used; how many children would remain home.
- Fix the definition of "candidate for foster care" in FFPSA.
- Expand preventive/pre-petition counsel available to parents before separation; provide information about services/supports available to caregivers.
- Children's Bureau guidance to the field that will discourage use of hidden foster care.

GOAL: GUARD RAILS, LEGAL PROTECTIONS.

Why would Congress legislate all the federal foster care laws on the books just to let them be circumvented by Hidden Foster Care?

HOW YOU CAN HELP

- Let us know what is happening in your state. Email Diane and do our survey.
- Reach out to Sharon to get connected to the working group member from your state.
- If you have a relationship with your Senator or Congressman and want to help facilitate communication with them, let us know.

Questions/Discussion/Panelists' Contact Information

- Sharon Balmer Cartagena: sbalmer@publiccounsel.org
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- Diane Redleaf: dianeredleaf@gmail.com or familydefenseconsulting@gmail.com